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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 564

F. E. BUFFUM, AS TRUSTEE IN BANKRUPTCY OF HENRY JOSEPH BARCELOUX, BANKRUPT, PETITIONER,

vs.

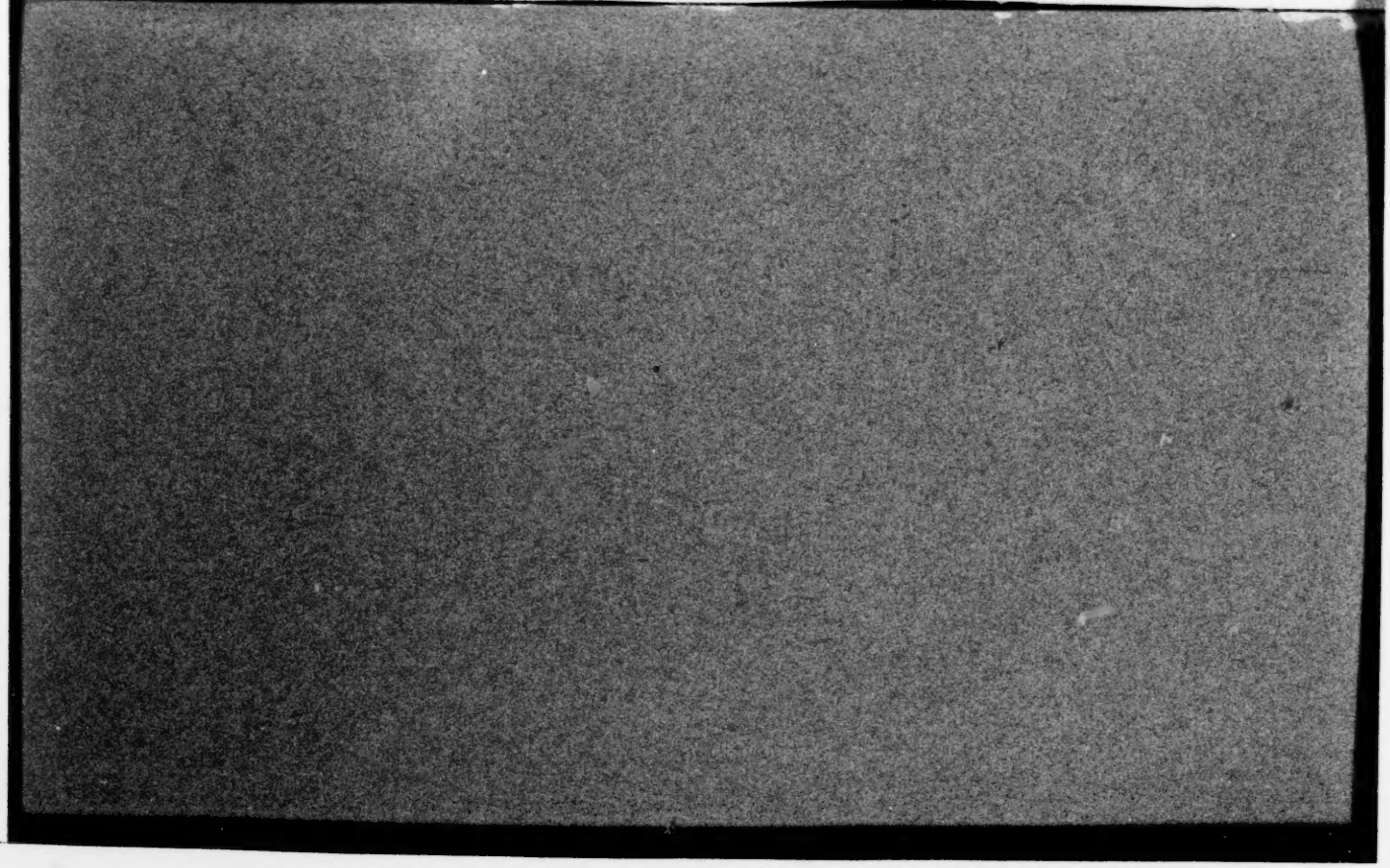
PETER BARCELOUX COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 31, 1931

CERTIORARI GRANTED JANUARY 23, 1932

(37,261)



(37,261)

SUPREME COURT OF THE UNITED STATES

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In the Northern Division of the United States District Court, in and for the Northern District of California.

EQUITY—No. ——.

F. E. BUFFUM, as Trustee in Bankruptcy of HENRY JOSEPH BARCELOUX, a Bankrupt,

Complainant,

vs.

PETER BARCELOUX COMPANY, a Corporation, and GEORGE R. FREEMAN, as Administrator of the Estate of FRANK FREEMAN, Deceased,

Defendants.

BILL OF COMPLAINT.

F. E. Buffum, as Trustee in Bankruptcy of Henry Joseph Barceloux, bankrupt, brings this, his bill of complaint, against Peter Barceloux Company, a corporation, and George R. Freeman, as administrator of the estate of Frank Freeman, deceased, and thereupon alleges as follows:

I.

That complainant is a citizen of the United States and the State of California, and resides at Colusa in the Northern District of California.

II.

That defendant, George R. Freeman, is a citizen of the United States, and the State of California, residing at Willows in said Northern Division of the District of California, and at all times herein mentioned was, and still is the duly appointed, qualified and acting administrator of the estate of Frank Freeman, deceased; and that the defendant, Peter Barceloux Company, is a corporation duly organized and existing under and by virtue of the laws of the State of California, and has its principal office and place of business in the city of Willows in said northern division of the Northern District of the State of California, and [1*] is a citizen and inhabitant of said division and state; that said Peter Barceloux Company is a corporation duly organized for the purpose of operating the properties of one Peter Barceloux, deceased, who was the father of

*Page-number appearing at the foot of page of original certified Transcript of Record.

Henry Joseph Barceloux, bankrupt, hereinafter mentioned, and at all times herein mentioned prior to, and on or about the 16th day of August, 1926, the stockholders thereof consisted of George A. Barceloux, brother of said bankrupt, Cora Gelinas, sister of said bankrupt, and two sons of the deceased brother of said bankrupt, and said Henry Joseph Barceloux, bankrupt, and that all said named persons still are stockholders thereof, except that all the stock of Henry Joseph Barceloux is now claimed by said defendant to be owned by George A. Barceloux.

III.

That heretofore and on or about the 25th day of February, 1927, a petition in voluntary bankruptcy, signed and verified by said Henry Joseph Barceloux, was duly filed in the District Court of the United States in and for the Northern District of California, alleging that for a greater portion of six months next immediately preceding the filing of said petition, said Henry Joseph Barceloux had resided at Willows, aforesaid, and that he owed debts which he was unable to pay in full, and praying that he be adjudged to be a bankrupt; that thereafter such proceedings were duly had upon said petition; that on or about the 25th day of February, 1928, an order was duly made and entered in said District Court wherein and whereby it was adjudged and decreed that said Henry Joseph Barceloux was a bankrupt within the purview of the acts of Congress relating to bankruptcy; that thereafter such proceedings were duly had upon said petition and adjudication; that the first meeting of

creditors of said Henry Joseph Barceloux was duly called and held at the office of Richard Belcher, Esq., a referee in bankruptcy and to whom said [2] bankruptcy proceedings were duly and legally referred, and at said first meeting of creditors and on or about the 14th day of March, 1927, complainant was duly appointed trustee of said Henry Joseph Barceloux and of his assets; that thereafter complainant duly and regularly qualified as such trustee and has been at all times thereafter, and still is, the duly and regularly appointed, qualified and acting trustee of said estate of Henry Joseph Barceloux, bankrupt.

IV.

That on or about the 27th day of April, 1926, and while Henry Joseph Barceloux was president and managing director of said defendant, Peter Barceloux Company, said Henry Joseph Barceloux voluntarily purported to execute and deliver to said defendant, Peter Barceloux Company, a pledge agreement, a copy of which is hereto attached and marked Exhibit "A" and made a part hereof for every purpose, whereby he purported to secure certain pre-existing indebtedness, evinced by certain promissory notes in said agreement set forth; and that pursuant to said pledge agreement and at said time did purport to deposit with the defendant, Peter Barceloux Company, a certain Certificate No. 5, evidencing two thousand four hundred ninety-nine (2,499) shares of the capital stock of said Peter Barceloux Company, then the property of said Henry Joseph Barceloux, with the intent to hinder, delay, and defraud his creditors, and to dis-

possess himself of the bulk of his properties and assets to prevent his nonkindred creditors from satisfying their respective claims, and by said transfer said Henry Joseph Barceloux became insolvent and had remaining no properties from which either his judgment lien or unsecured creditors could satisfy their respective claims, unless the stock so transferred could be applied to the payment thereof; that said purported transfer and pledge was made and executed with knowledge and notice of Peter Barceloux Company of said intent of Henry Joseph Barceloux; and that complainant is informed and believes, and upon such information and belief alleges, that at all of said [3] times herein mentioned, said Two Thousand Four Hundred Ninety-nine (2,499) shares of said capital stock was reasonably worth the sum of Eighty Thousand Dollars ($80,000.00).

V.

That on or about the 29th day of June, 1926, and while said Henry Joseph Barceloux was president and managing director of said defendant, Peter Barceloux Company, he did purport to deposit with said defendant, Peter Barceloux Company, further certificates of stock, to wit: Seventy-five (75) shares of Pacific National Fire Insurance Company, evidenced by Certificate No. 126; five (5) shares of capital stock of the Bank of Orland, evidenced by Certificate No. 25; four (4) shares of capital stock of the Bank of Orland, evidenced by Certificate No. 26; fifty (50) shares of Glenn County Garage Company, evidenced by Certificate No. 53; and fifty (50) shares of Glenn

County Garage Company, evidenced by Certificate No. 10; as additional security for the promissory notes referred to in said pledge agreement, which is attached hereto and marked Exhibit "A," which said securities constituted the remaining unincumbered properties of said bankrupt, known to said defendant, Peter Barceloux Company; that said certificates of stock, given as such additional security, were given voluntarily by said Henry Joseph Barceloux and without consideration, with intent to hinder, delay and defraud his nonkindred creditors; and that said defendant accepted said additional security knowing of such intent of Henry Joseph Barceloux and when it already possessed property of said Henry Joseph Barceloux as security for such indebtedness of a value of over twice the total amount of said indebtedness; that plaintiff is informed, and believes, and upon such information and belief alleges that [4] at all times herein mentioned the reasonable value of all such shares of stock last above mentioned was, and still is, the sum of Twenty-one Hundred Dollars ($2100.00).

VI.

That on or about the 16th day of August, 1926, defendant Peter Barceloux Company did purport to hold a sale of all the above-mentioned securities for the payment and satisfaction of the purported obligations and indebtedness set forth in said pledge agreement and attached hereto and marked Exhibit "A," and also the following additional purported indebtedness or obligations:

The sum of One Thousand Dollars ($1,000.00), claimed to be due by said Henry Joseph Barceloux

to said defendant on January 3d, 1923, together with interest thereon in the sum of Two Hundred Seventy-six and 60/100 Dollars ($276.60).

The sum of Seventeen Hundred Seventeen and 62/100ths Dollars ($1717.62), claimed to be due of said Henry Joseph Barceloux to said defendant within two (2) years prior to August 4th, 1926, with interest thereon in the sum of Three Hundred Four and 18/100ths Dollars ($304.18).

The sum of Eighteen Hundred Dollars ($1800.00), claimed to be due by said Henry Joseph Barceloux to said defendant within two (2) years prior to the 4th day of August, 1926, together with interest thereon in the sum of Eight Hundred Thirty Dollars ($830.00).

That said purported obligation, or indebtedness, in the amount of Eighteen Hundred Dollars ($1800.-00), with interest thereon in the sum of Eight Hundred Thirty Dollars ($830.00), was not an obligation accruing or belonging to the Peter Barceloux Company, nor was it in any way owing thereto or in any manner secured by said pledges or either of them; that at said time said defendant, Peter Barceloux Company, by and through its secretary, [5] Cora Gelinas, sister of said Henry Joseph Barceloux, did purport to sell in one lot the whole or all of the shares of stock hereinbefore mentioned to itself for the sum of Thirty-six Thousand Three Hundred Fourteen and 41/100ths Dollars ($36,314.-41), being the sum of Thirty-five Thousand Eight Hundred Fourteen and 41/100ths Dollars ($35,814.-41), the amount, with interest, claimed by said defendant to be then due to it by said Henry Joseph

Barceloux, secured by said pledges, and each of them, including said item of Eighteen Hundred Dollars ($1800.00) principal and Eight Hundred Thirty Dollars ($830.00) interest, hereinabove mentioned, together with the sum of Five Hundred Dollars ($500.00) attorneys' fees; that at the time of said sale there was not due, owing or payable to said defendant, Peter Barceloux Company, by said Henry Joseph Barceloux, upon the security of said pledges, or otherwise, the sum of Thirty-six Thousand Three Hundred Fourteen and 41/100ths Dollars ($36,314.-41); and the complainant has no information or belief as to the amount then and there due, owing and payable, or secured by said pledges or either of them, if any, and upon such lack of information or belief alleges that no sum whatever was then or there due, owing or payable, or secured by said pledges, or either of them; that such sum of Five Hundred Dollars ($500.00) as attorneys' fees is excessive and unwarranted; and that a fee of Fifty Dollars ($50.-00) is a fair and reasonable counsel fee for the matters referred to in said pledge agreement.

VII.

That for a long time prior to the purported execution and delivery of said pledge agreements, and each thereof, and said purported sale thereunder, there existed creditors of Henry Joseph Barceloux, whose claims have been reduced to judgment, among whom was George R. Freeman, as administrator of the estate of Frank Freeman, deceased; and that proof of said claim of said [6] George R. Freeman, evidenced by such judgment against said

bankrupt, has been filed and approved in said bankruptcy proceedings.

VIII.

That said pledges, and each of them, if they in fact existed, and said sale thereunder, were fraudulent and void as to the nonkindred creditors of Henry Joseph Barceloux, in that, each and everything done thereunder was done on the part of Henry Joseph Barceloux to defraud, hinder, and defeat his creditors and to dispossess himself of his properties, to defeat the satisfaction and the payment of his nonkindred creditors, including both judgment lien and unsecured creditors, and that said sale was for the payment of purported obligations and indebtedness amounting to a greater sum than was due, owing, or payable at the time of said sale, or any other time, and for other obligations than those secured by said pledges, or either or them, and that said excessive amount and obligations not so due and owing and/or secured were paid from the proceeds derived from said sale for the purpose of kindering, defrauding, and delaying the nonkindred creditors, and that the sum of Five Hundred Dollars ($500.00) for attorneys' fees was excessive and unequitable, and was collected with the intent to hinder, delay, and defraud the creditors of Joseph Henry Barceloux, not intended to be protected by said pledge agreement and actually has defrauded them; and that said pledge of July 29th, 1926, was given when said defendant, Peter Barceloux Company, already held security of value for over twice the total amount of said total indebtedness, and was taken and sold with the intent to hin-

der, delay and defraud said creditors of Henry Joseph Barceloux; that said sale was made at a pretended public sale without demand for the payment of said indebtedness, or any thereof, without any notice thereof, and without bidders [7] being present at such sale, and that the price realized from said sale was grossly inadequate and said sale was improvident; and in view of the foregoing, defendant Peter Barceloux Company failed and refused to adjourn said sale, all of which was so done and taken with intent to hinder, delay, and defraud the nonkindred creditors of Henry Joseph Barceloux and did actually so defraud them; that said pledges, and each of them, and the sale and everything that was done thereunder was fraudulent and void, as to the said creditors of Henry Joseph Barceloux, in that all of said transactions were conceived, executed and taken from beginning to end with the intent to hinder, delay and defraud all the creditors of Henry Joseph Barceloux not intended to be protected by said pledges; that they were, and each of them was, so executed and taken when, and at all times herein mentioned, Henry Joseph Barceloux was in failing financial circumstances and/or insolvent and contemplating the filing of a voluntary petition in bankruptcy, which was at all said times well known to the defendant, Peter Barceloux Company; that by reason of said sale, the assets of said estate of Henry Joseph Barceloux, bankrupt, are insufficient to pay the creditors thereof who have filed claims in said bankruptcy proceedings, in that the value thereof so far as the same remained in the possession of said bankrupt at the date of

his adjudication was approximately Three Hundred Dollars ($300.00), and that the liabilities, exclusive of the cost of the administration in said bankruptcy proceedings are in excess of One Hundred Thousand Dollars ($100,000.00).

IX.

That the complainant is informed and believes, and upon such information and belief alleges that after the date of said sale of said securities, to wit, on the 16th day of August, 1926, said defendant, Peter Barceloux Company, did purport to sell all of [8] said securities to George A. Barceloux, brother of said bankrupt, and that said George A. Barceloux has at all times thereafter, and still does, purport to hold and possess said securities as owners thereof.

X.

That as to said two thousand four hundred ninety-nine (2,490) shares of the capital stock of said Peter Barceloux Company, defendant George R. Freeman, as administrator of the estate of Frank Freeman, deceased, claims that the same were, prior to four (4) months from the filing of said petition in bankruptcy, transferred and assigned to him as such administrator by said Henry Joseph Barceloux by way of security for the payment of a considerable sum of money then and now due to him as such administrator by said Henry Joseph Barceloux; that an accounting is necessary to ascertain what, if any, moneys, were at the time of said sale due to defendant Peter Barceloux Company by said Henry Joseph Barceloux and secured by said pledges, or

either of them; that an accounting is necessary to ascertain what moneys, if any, were, at the time of said sale, and now are due or owing to said George R. Freeman upon the security of said transfer and assignment; that none of said shares of stock are quoted on any stock exchange and that plaintiff has no means of ascertaining the actual value of such shares other than by an inquiry as to the valuation of the assets and liabilities of the respective corporation issuing the same, and that without the aid of this Court, defendant Peter Barceloux Company, and the others of said corporations, will refuse to allow any such inquiry and valuation; that an inquiry is necessary to ascertain the respective rights of all parties thereto; that it is necessary that the equities of all parties hereto be adjusted in one action; and that complainant is entitled to recover from defendant Peter Barceloux [9] Company, the excess, if any, over and above the amount, if any, found to be due and owing to said George R. Freeman upon the security of said transfer and assignment at the time of said sale and still remaining due and owing, and the value of all of said shares of stock at the time of said sale.

WHEREFORE, complainant prays:

1. That an inquiry and accounting be had and made as to what moneys, if any, were on said 16th day of August, 1926, and are now *due owing* by said Henry Joseph Barceloux to defendant George R. Freeman, as administrator of the estate of Frank Freeman, deceased, which are secured by said assignment and transferred to said defendant of said two thousand four hundred ninety-nine (2,499)

shares of capital stock of Peter Barceloux Company.

2. That an inquiry and decree be had and made as to the values of all of said stocks on August 16th, 1926.

3. That said pledges of April 27th, 1926, and of June 29th, 1926, and said sale thereunder be decreed fraudulent and void, and that complainant *has* judgment against defendant, Peter Barceloux Company, for the value of all of said shares of stock at the time of said sale, to wit, August 16th, 1926, less such sum, if any, as may be found to be due or owing to George R. Freeman, as administrator of the estate of Frank Freeman, deceased, upon the security of said transfer and assignment at the time of said sale and still remaining due or owing, together with interest thereon at the rate of 7% from said 16th day of August, 1926.

4. That an inquiry and decree be had and made as to the respective rights and equities of the parties hereto, and for such other and further relief as to the Court may seem fit and proper.

Dated, March 16, 1928.

DEVLIN & DEVLIN,
Attorneys for Complainant. [10]

State of California,
County of Colusa,—ss.

F. E. Buffum, being first duly sworn on oath deposes and says he is Trustee in the within-entitled proceeding and that he has read the foregoing and annexed bill of complaint and knows the contents thereof, and that the same is true of his own knowl-

edge except as to such matters as are therein stated upon his information or belief, and as to those matters that he believes it to be true.

[Seal] F. E. BUFFUM.

Subscribed and sworn to before me, this 16th day of March, 1928.

ELLIS T. CRANE,

Notary Public in and for the County of Colusa, State of California.

[Endorsed]: Filed Apr. 3, 1928. [11]

[Title of Court and Cause.]

ANSWER OF PETER BARCELOUX COMPANY.

Comes now the defendant, Peter Barceloux Company, a corporation, and for answer herein admits, denies and alleges as follows:

I.

Answering Paragraph One of complainant's bill of complaint, this answering defendant admits the whole thereof.

II.

Answering Paragraph Two of complainant's bill of complaint, this answering defendant admits that defendant, George R. Freeman, is a citizen of the United States, and the State of California, residing at Willows, in the Northern Division of *the District* of California, and at all times herein mentioned was, and still is, the duly appointed, qualified and

acting administrator of the estate of Frank Freeman, deceased; and that the defendant, Peter Barceloux Company, is a corporation duly organized and existing under and by virtue of the laws of the State of California, and has its principal place of business in the city of Willows in the Northern Division of the Northern District of the State of [12] California, and is a citizen and inhabitant of said division and state; and that said Peter Barceloux Company is a corporation duly organized for the purpose of operating the properties of one Peter Barceloux, deceased, who was the father of Henry Joseph Barceloux, bankrupt, and the properties of Lumina Barceloux, mother of said bankrupt, and that on and prior to the 16th day of August, 1926, the stockholders of said Peter Barceloux Company consisted of George A. Barceloux, brother of said bankrupt, Cora Gelinas, sister of said bankrupt, and three sons of a deceased brother of said bankrupt, and Henry Joseph Barceloux, and that all said persons are still stockholders thereof except the said Henry Joseph Barceloux; and denies that all the stock of said Henry Joseph Barceloux is now claimed by this answering defendant to be owned by George A. Barceloux.

III.

Answering Paragraph Three of complainant's bill of complaint, this answering defendant admits; on or about the 25th day of February, 1927, a petition in voluntary bankruptcy, signed and verified by said Henry Joseph Barceloux, was duly filed in the District Court of the United States in and for the Northern District of California alleging that

for a greater portion of six months next immediately preceding the filing of said petition, he, the said bankrupt, had resided in Willows, and that he owed debts which he was unable to pay in full, and praying that he be adjudged to be a bankrupt; and admits that thereafter such proceedings were duly had upon said petition; that on or about the 25th day of February, 1927, an order was duly made and entered in said District Court wherein and whereby it was adjudged and decreed that the said Henry Joseph Barceloux was a bankrupt within the purview of the acts of Congress relating to bankruptcy; and that thereafter such proceedings were duly had upon such [13] petition and adjudication; that the first meeting of creditors of said Henry Joseph Barceloux was called and held at the office of Richard Belcher, Esq., a Referee in Bankruptcy to whom said bankruptcy proceedings were duly and legally referred, and at said first meeting of creditors on or about the 14th day of March, 1927, F. E. Buffum, the complainant herein, was appointed Trustee of said Henry Joseph Barceloux and of his assets; and that thereafter complainant qualified as such trustee and has been such at all times thereafter, and still is, the appointed, qualified and acting trustee of said estate of Henry Joseph Barceloux.

IV.

Answering Paragraph Four of complainant's bill of complaint, this answering defendant denies that on the 27th day of April, 1926, or at any other time or at all, and while the said Henry Joseph Barce-

loux was president and managing director of said defendant, Peter Barceloux Company, that he voluntarily, or at all willingly, purported to execute and/or deliver to said defendant, Peter Barceloux Company, a pledge agreement whereby he purported to secure certain pre-existing indebtedness, evidenced by certain promissory notes in said agreement set forth; and denies that pursuant to any willing, or voluntary pledge agreement, that he the said Henry Joseph Barceloux did deposit with the Peter Barceloux Company any certain Certificate No. 5, evidencing two thousand four hundred ninety-nine (2,499) shares of the capital stock of the Peter Barceloux Company, then the property of Henry Joseph Barceloux; but alleges the fact to be that the said Peter Barceloux Company had held such Certificate No. 5, evidencing the ownership in Henry Joseph Barceloux of two thousand four hundred ninety-nine (2,499) shares of the capital stock of Peter Barceloux Company, as security for the payment of obligations due and owing, and to be due and owing from the [14] said Henry Joseph Barceloux to the said Peter Barceloux Company for several years prior to the 27th day of April, 1926; and that said pledge agreement, Exhibit "A," was only executed and delivered by Henry Joseph Barceloux to the Peter Barceloux Company on April 27, 1926, after the insistent demands of the said Peter Barceloux Company, and not willingly or voluntarily; and denies that said pledge agreement was executed and/or delivered to the said Peter Barceloux Company with any intent to hinder

and/or delay and/or defraud his creditors, or any of them, and/or to dispossess himself of the bulk or any portion of his properties, and/or assets, or to prevent his nonkindred creditors from satisfying their respective claims, or any claims; and denies that by said alleged transfer said Henry Joseph Barceloux became insolvent, and/or had remaining no property from which either his judgment lien, and/or unsecured creditors could satisfy their respective claims, unless the stock so transferred could be applied for the payment thereof; but alleges the fact to be that at the time said security was taken, that he held and owned property equal, if not greater in value than his then existing debts and obligations to any person whomsoever; and denies that said alleged purported transfer, and/or pledge, was made and/or executed with any knowledge or any notice of the said Peter Barceloux Company of said, or any intent of, Henry Joseph Barceloux to defeat, or defraud, or to hinder, or delay any creditors of said Henry Joseph Barceloux in the satisfaction of any of their said claims; and denies that at all times in complainant's bill of complaint mentioned, the said two thousand four hundred ninety-nine (2,499) shares of the said capital stock was of the reasonable value of Eighty Thousand Dollars ($80,000.00), or of any value in excess of approximately Thirty-six Thousand Three Hundred Fourteen and 41/100 Dollars ($36,314.41).

V.

Answering Paragraph Five of complainant's bill

of complaint, [15] this answering defendant admits that on or about the 29th day of June, 1926, and while the said Henry Joseph Barceloux was president and managing director of said defendant, Peter Barceloux Company, he did deposit with said Peter Barceloux Company, seventy-five (75) shares of Pacific National Fire Insurance Company, evidenced by Certificate No. 126; five (5) shares of capital stock of the Bank of Orland, evidenced by Certificate No. 25; four (4) shares of capital stock of the Bank of Orland, evidenced by Certificate No. 26; fifty (50) shares of Glenn County Garage Company, evidenced by Certificate No. 53; and fifty (50) shares of Glenn County Garage Company, evidenced by Certificate No. 10; but denies that said stock was deposited with the Peter Barceloux Company only as additional security for the promissory notes referred to in said pledge agreement, Complainant's Exhibit "A," but as security of said debts and obligations referred to in Complaint's Exhibit "A," and other and additional debts and obligations then owing by the said Henry Joseph Barceloux to said Peter Barceloux Company; and denies that said securities, or any of said securities, constituted the remaining unencumbered property of the said bankrupt, or that the defendant, Peter Barceloux Company, knew or had any information thereof; and denies that said or all, or any of the above-mentioned stocks and securities were given voluntarily by said Henry Joseph Barceloux, and/or without consideration, and/or with intent to hinder, and/or delay or defraud his nonkindred creditors;

and denies that this answering defendant accepted said additional security knowing of any such intent on the part of Henry Joseph Barceloux to so hinder, delay, or defraud any of his alleged creditors; and denies that this answering defendant already possessed property of the said Henry Joseph Barceloux as security for his indebtedness of the value of twice the amount of such [16] indebtedness, or at all greater than said indebtedness; and denies that the reasonable value of all such shares of stock, last above mentioned, was and still is of the value of Two Thousand One Hundred Dollars ($2,100.00) but is of no greater value than the sum for which the same was bid in by Peter Barceloux Company at said pledge sale.

VI.

Answering Paragraph Six of complainant's bill of complaint herein, this answering defendant denies that on or about the 16th day of August, 1926, defendant, Peter Barceloux Company, did purport to hold a sale of all the above-mentioned securities for the payment and satisfaction of the alleged purported obligations and indebtedness set forth in said pledge agreement, Complainant's Exhibit "A," and also the following additional purported indebtedness, or obligations:

The sum of One Thousand Dollars ($1,000.00), claimed to be due by said Henry Joseph Barceloux to said defendant on January 3d, 1923, together with interest thereon in the sum of Two Hundred Seventy-six and 60/100 Dollars ($276.60).

The sum of Seventeen Hundred Seventeen Dollars and Sixty-two cents ($1717.62), claimed to be due by said Henry Joseph Barceloux to said defendant prior to August 4, 1926, with interest thereon in the sum of Three Hundred Four and 18/100 Dollars ($304.18).

The sum of Eighteen Hundred Dollars ($1800.00), claimed to be due by said Henry Joseph Barceloux to said defendant within two years prior to the 4th gday of August, 1926, together with interest thereon in the sum of Eight Hundred Thirty Dollars ($830.00). [17]

But alleges the fact to be that on the said 16th day of August, 1926, said Peter Barceloux Company did, as a fact, sell at public sale, after due and legal notice had and given of its intention so to do, did sell at public auction, in the manner required by law for the sale of pledged property, between the hours of 9:30 o'clock A. M., and 5:00 o'clock P. M., of that day, in front of the courthouse door in the town of Willows, county of Glenn, State of California, all said above-mentioned stock and securities for the indebtedness which it then held against Henry Joseph Barceloux, and at said time and place aforesaid, the Peter Barceloux Company being the highest and best bidder therefor, purchased said stock for the sum of Thirty-six Thousand Three Hundred Fourteen and 41/100 Dollars ($36,314.41) in satisfaction of said debt and obligation then due and owing to it by the said Henry Joseph Barceloux; and that thereafter said debt of said Henry Joseph Barceloux was canceled and all notes, debts and ob-

ligations being held by the Peter Barceloux Company were satisfied and discharged.

Denies that the Eighteen Hundred Dollars ($1800.00) obligation, with interest thereon in the sum of Eight Hundred Thirty Dollars ($830.00), was not an obligation accruing to, or belonging to the Peter Barceloux Company; and denies that said Eighteen Hundred Dollars ($1800.00) with interest thereon, was not secured by said pledge agreement; but alleges the fact to be that said Eighteen Hundred Dollars ($1800.00) and interest thereon, was a valid and subsisting obligation due and owing to Peter Barceloux Company, and was secured by said pledge agreement, and that said sum of Thirty-six Thousand Three Hundred Fourteen and 41/100 Dollars ($36,314.41) was than a subsisting and valid obligation [18] owing by said Henry Joseph Barceloux to the said Peter Barceloux Company; and denies that the sum of Five Hundred Dollars ($500.00) as attorneys' fees was not a just and reasonable sum to be paid for the preparation of the papers and proceedings in connection with the sale of said pledged stock in satisfaction of said debt, or that the sum of Fifty Dollars ($50.00) was a fair and reasonable fee for the doing and performing of said work.

VII.

Answering Paragraph Seven of complainant's bill of complaint herein, this answering defendant has not sufficient knowledge, information or belief sufficient to enable it to deny the same under oath, and basing its denial thereon, denies that for a long

time prior to the alleged purported execution and delivery of said pledge agreement and sale thereunder, there existed creditors of Henry Joseph Barceloux, whose claims had been reduced to judgment, among whom was George R. Freeman, as administrator of the estate of Frank Freeman, deceased; and that proof of said claim of said George R. Freeman, evidenced by such judgment against said bankrupt, had been filed and approved in said bankruptcy proceedings.

VIII.

Answering Paragraph Eight of complainant's bill of complaint herein, this answering defendant denies that said pledges, and/or each or any of them, and/or the sale thereunder, were fraudulent, and/or void as to the nonkindred or any other creditors of Henry Joseph Barceloux; and denies that each and/or everything or anything done thereunder, was done on the part of Henry Joseph Barceloux to defraud, and/or to hinder, or defeat his creditors, [19] and/or to dispossess himself of his property to defeat the satisfaction and payment of his nonkindred or other creditors, including both judgment lien or unsecured creditors; and denies that said sale was for the payment of any mere purported obligation, and/or indebtednesses, but was in satisfaction of an actual, just and legal obligation due from Henry Joseph Barceloux to this answering defendant; and denies that said indebtedness was greater than the amount due and/or owing and/or payable at the time of said sale; and further denies that said sale of said stock was in satisfac-

tion of any debts or obligations not secured by said pledge agreement, as aforesaid; and denies that said sale, or any sale of said stock or securities, as aforesaid, were had or made for any purpose of hindering and/or defrauding and/or delaying any non-kindred, or other creditors; and denies that said sum of Five Hundred Dollars ($500.00) for attorneys' fees was excessive, or inequitable, or was paid or collected with any intent to hinder or delay or defraud any creditors of Henry Joseph Barceloux or that any of said creditors have been defrauded or hindered from collecting any debt on account thereof; and denies that said alleged pledge of July 29, 1926, was given when this answering defendant held security of twice the value of its indebtedness, or in any value greater than its indebtedness, or that the same was had for any purpose of hindering, and/or delaying, and/or defrauding any creditor, or creditors, of said Henry Joseph Barceloux; and denies that said sale was made at any pretended public sale without demand for the payment of said indebtedness; but alleges the fact to be that due and legal demand was made for the payment of said debt and obligation many months prior to said sale, and said sale was only had after due and legal public notice [20] given as required by law for the sale of pledged property, all of which was well known to the creditors of the said Henry Joseph Barceloux; and denies that the price realized from said sale was grossly, or at all inadequate, or that said sale was improvident, or that the said Peter Barceloux Company failed, or neglected, or refused to adjourn any certain

sale, or that anything done or taken by them was with any purpose or intention to hinder and/or delay and/or defraud the nonkindred or any creditors of Henry Joseph Barceloux, or that any of them were actually defrauded, or hindered, or delayed by reason thereof in the collection of their debt, if any; and denies that said pledges and each, or either, or any of them, or the sale thereunder, and everything or anything that was done thereunder was either fraudulent or void as to any creditor of Henry Joseph Barceloux, or that all, or any of such transactions were conceived and/or executed and/or taken from beginning to end, or at all, with intent to either hinder, and/or delay, and/or defraud all, or any, of the creditors of Henry Joseph Barceloux, or that the said, or each, or any of them were executed and/or taken when the said Joseph Barceloux was in failing financial circumstances, or insolvent, or contemplating the filing of a voluntary petition in insolvency, or that said alleged financial condition was at all, or any times known to this answering defendant; and denies that by reason of said sale, or any sale, of said assets, as aforesaid, the estate of Henry Joseph Barceloux became insufficient to pay his creditors who have filed in said bankruptcy proceedings; but alleges the fact to be that when said pledges were given, the said Henry Joseph Barceloux owned and held property equal, if not greater, in value and amount than the amount of his said indebtedness. [21]

IX.

Answering Paragraph Nine of complainant's bill

of complaint herein, this answering defendant admits that after the said 16th day of August, 1926, that the said Peter Barceloux Company did purport to sell all of said securities to George A. Barceloux, the brother of said bankrupt; and denies that the said George A. Barceloux has at all times thereafter, and still does, purport or claim to hold and possess said securities as owner thereof.

X.

Answering Paragraph Ten of complainant's bill of complaint herein, this answering defendant admits that George R. Freeman, as administrator of the estate of Frank Freeman, deceased, claims that the two thousand four hundred ninety-nine (2,499) shares of the capital stock of Peter Barceloux Company were assigned to him prior to four months from the filing of the petition in bankruptcy, as security for the payment of a considerable sum of money then alleged to be due him as administrator of the estate of Frank Freeman, deceased, from said Henry Joseph Barceloux, and allege that said assignment was long after the execution and delivery of the pledge agreement of said securities to this answering defendant; but denies that any accounting is necessary to ascertain what, if any, moneys were at the time of said sale due to the said Peter Barceloux Company, secured by said pledges; and denies that an accounting is necessary to ascertain what moneys, if any, were at the time of said sale, or now due, or owing to said George R. Freeman upon the security of said transfer and assignment;

admits that none of said shares or stock are quoted on any stock exchange; but denies that complainant has no means of ascertaining the actual value of said shares other [22] than by inquiry as to the values of the assets and liabilities of the respective corporations issuing the same, without the aid of this Court; and denies that the said Peter Barceloux Company, or other of said corporations, will refuse to allow any such inquiry of values; and denies that such inquiry is necessary to ascertain the respective rights of all the parties thereto; and denies that it is necessary that the equities of all parties thereto be adjusted in one action; and denies that complainant is entitled to recover from the defendant, Peter Barceloux Company the excess, if any, over and above the amount, if any, found to be due and owing to George R. Freeman, as administrator of the estate of Frank Freeman, deceased, upon the security of such transfer and assignment at the time of said sale and still remaining due and owing, and the value of all of said shares of stock at the time of said sale.

That the said George R. Freeman, as administrator of the estate of Frank Freeman, deceased, has no right, title, interest or claim of, in or to any of said stock or securities, or any part thereof; and that his said alleged claim is without consideration and of no avail as against the rights of this answering defendant.

WHEREFORE, this answering defendant prays:

I.

That the complainant take nothing by this action.

II.

That George R. Freeman, as administrator of the estate of Frank Freeman, deceased, take nothing by this action.

III.

That the title of the Peter Barceloux Company, of, in and to the securities herein held by it, and that the title of the [23] Peter Barceloux Company in and to the securities in this answer herein mentioned, be declared to be good and valid; and that it have its costs herein.

W. T. BELIEU,

Attorney for Defendant, Peter Barceloux Company.

State of California,
County of Glenn,—ss.

George A. Barceloux, being first duly sworn, on oath deposes and says:

That he is the president of the Peter Barceloux Company and as such authorized to verify the above and foregoing answer; that he has read the above and foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to such matters as are therein stated on his information and belief and as to those matters he believes it to be true.

GEORGE A. BARCELOUX,

Subscribed and sworn to before me this 28th day of April, 1928.

[Seal] W. T. BELIEU,
Notary Public in and for Glenn County, California.

[Endorsed]: Filed Apr. 30, 1928. [24]

[Title of Court and Cause.]

DISMISSAL OF DEFENDANT GEORGE R. FREEMAN, AS ADMINISTRATOR OF THE ESTATE OF FRANK FREEMAN, DECEASED.

To the Clerk of the Above-entitled Court:

The above and foregoing action is hereby dismissed as to the defendant George R. Freeman, as administrator of the estate of Frank Freeman, deceased, without prejudice, and you are hereby requested to enter an order of dismissal as to said defendant without prejudice.

Dated, March 11th, 1929.

DEVLIN & DEVLIN,
Attorneys for Complainant.

The undersigned defendant, George R. Freeman, as administrator of the estate of Frank Freeman, deceased, without prejudice of any knid whatever, does hereby consent to the above and foregoing dismissal.

Dated, March 11, 1929.

GEORGE R. FREEMAN.

As Administrator of the Estate of Frank Freeman, Deceased, Appearing in His Own Proper Person.

[Endorsed]: Filed 3/11/29. [25]

United States District Court, California, Northern District.

263.

BUFFUM, Trustee,

vs.

PETER BARCELOUX CO.

267.

ID.

vs.

CORA GELINAS.

OPINION.

These suits are consolidated for trial.

Plaintiff is trustee of the estate of Henry Barceloux, Bankrupt, and defendants are transferees of portions of his property alleged to have been made with mutual intent to hinder, delay and defraud his creditors.

Without ranging as wide as does the evidence, by the latter it appears that in 1926 the bankrupt later so adjudicated was of large operations in banking,

real estate, ranching, etc., and had arrived at a crisis in his affairs. He had extensive properties and likewise debts. If not insolvent in the sense of the bankruptcy law, he was in that of the local law for that he could not pay his debts due.

Amongst his properties were 2,494 shares of the defendant in case 263, a family corporation the shares of which always had been owned by him, his brother George, his Sister Cora, defendant in case 267, and three children of his deceased brother. Its book value was fully $36.00 per share. Of course held in the family it had, strictly speaking, no market value. Moreover it was subject to a reservation of all income from the corporate property (with perhaps some unimportant exception of surplus) in favor of the mother of Henry and the others, evidently an aged woman of years undisclosed. Others of Henry's [26] properties were certain stocks, unincumbered and of value some $2,400.00 which may be described as pledge 2, and certain bank stocks incumbered $13,800.00 and of value $24,100.00, and one share of defendant corporation unincumbered, which may be described as the Gelinas transfer. These three parcels are the subject matter of the suits.

In 1926 Henry's properties were of value some $180,000.00, and his debts, including those alleged due defendants, other relatives and attorneys, were about equal in amount if not some $191,000.00. In 1921, one Feeman secured judgment against Henry and one Donohoe, which in 1924 became final, and which less some $10,000.00 paid, in 1926 was in

amount some $58,000.00. From finality until June, 1926, Feeman and Henry co-operated to make a portion of this judgment from Donohoe, with such poor success that at the date last aforesaid Feeman was insisting upon security from Henry. To that end, on June 30, 1926, to Feeman, Henry executed a trust deed of Lake County lands in which with George he had a considerable equity, and assigned to Feeman said 2,494 shares of defendant, this latter, however, subject to a claim of pledge to defendant corporation to secure certain debts due it from Henry. Feeman at once sought from the corporation (at all times theretofore managed by Henry, George and Cora) an agreement that the corporate pledge would not be foreclosed save after 90 days' notice to him, which agreement after some consideration was refused. Henry testifies the assignment and proposed agreement created a "fuss" and that George and Cora "sold him out."

It is evident no stranger was wanted within the family corporation gates. Rapid action followed. As of June 29, 1926, but evidently of a time subsequent to the deed and assignment [27] aforesaid to Feeman, defendant corporation executed to itself a certificate of said 2,494 shares as pledgee. July 3, 1926, George procured from Henry the parcel, pledge 2, as additional security for the defendant corporation, though at the time the 2,494 shares claimed to be pledged to the corporation were of book value more than twice any debts claimed due it from Henry, and near three times the specific debts for which they had been pledged.

July 7, 1926, Henry conveyed to his wife his equity of some $2,900.00 in certain lands, for $1,000.00 cash or check, though it i sclaimed that at the same time he owed her far more.

July 28, 1926, he sold his qualifying share in defendant corporation to Cora for $10.00, and resigned the presidency he had held for 14 years.

August 5, 1926, the defendant corporation assumed to foreclose the pledges aforesaid, therein including debts not secured by the pledge, and to have purchased all thereof for the amount due.

August 24, 1926, for $2,000.00 Henry transferred to Cora certain bank stocks pledged for $13,800.00 and of value $24,100.00. About this time Henry deposited of his earnings in his son's account, for "school expenses," and paid him money on a note executed by Henry, he says, to his mother-in-law in 1915, and by her given to the son's mother for his use.

In September, 1926, defendant corporation assumed certain debts of Henry's and took over his collateral securities thereof. And in October, 1926, Henry assigned certain farming implements and his office furniture to his attorney, whereupon, he testified, he had no property left of any kind.

So, February 25, 1927, he was adjudicated a voluntary bankrupt, thereafter plaintiff appointed trustee. [28]

In respect to the pledge of the 2,494 shares to defendant corporation, it appears that if it was attempted to be made before Henry resigned as president, it was void for that the pledged certificate

and any writing of pledge until said time were in his possession along with all other corporate documents and books. And by virtue of local law, possession by the pledges taken thereunder and foreclosure and sale does not render the void pledge valid in respect to existing creditors of whom there were many and represented by plaintiff herein. The foreclosure is invalid also for that though assumed to have been made at public sale, no outcry was given, no bids invited, but said stock together with that of pledge 2 was quietly appropriated to defendant corporation as purchaser thereof for the amount due it, *en masse;* and it purports to have sold the pledged property for debts it was pledged to secure. The pledge agreement provided that upon a sale to satisfy its specific debts, any surplus proceeds could be appropriated to any other debt due the pledges from Henry. Payment from surplus, and payment by sale, are quite different. In the latter case, is sale of a pledge for debts other than for which the pledge was made, and the transaction is void.

Moreover, taking into account all the facts and circumstances in evidence, all that makes for credibility of witnesses and weight to be given to evidence, all the undefinables impressions of the trial, the conviction is compelled that the transfers involved were made with intent by all parties to hinder, delay and defeat Henry's creditors. When Henry was in desperate case, when appeared probability that his shares in the family corporation might vest in the stranger Feeman, George and

Cora undoubtedly [29] resented it, determined to prevent it, and with Henry immediately worked to that end. And it was but a natural development to aid him to dispose of all his other properties, to acquire them, to protect them from Feeman and other creditors. Their more or less contradictory testimony to their own innocency, fails to persuade to outweigh all that gives that sinister aspect to their actions which establish their intent not only to acquire Henry's properties, to satisfy their claims, perhaps to protect him also, but also to foil efforts of his unsecured creditors to make their claims out of his properties.

The last suffices to condemn.

The Court finds for plaintiff and against defendants.

The decree will provide for an auditor to take an account and determine the highest value of the property or stocks involved between their transfer to defendants and the audit. For so much will defendants account; and again following the local law, no part of the proceeds will be devoted to any defendants' claims against the bankrupt, until all his creditors existing at the time of the void transfers are paid in full.

July 25, 1929.

BOURQUIN, J.

[Endorsed]: Filed Jul. 29, 1929. [30]

In the Northern Division of the United States District Court, in and for the Northern District of California.

No. 263—EQUITY.

F. E. BUFFUM as Trustee in Bankruptcy of HENRY JOSEPH BARCELOUX, a Bankrupt,

Complainant,

vs.

PETER BARCELOUX COMPANY, a Corporation, and GEORGE R. FREEMAN, as Administrator of the Estate of FRANK FREEMAN, Deceased,

Defendants.

INTERLOCUTORY DECREE.

This cause came on to be heard at this term and was, in accordance with the order of this court, submitted on briefs, and now, after consideration thereof, IT IS ORDERED, ADJUDGED AND DECREED as follows, viz.:

That the complainant F. E. Buffum, as Trustee in Bankruptcy of Henry Joseph Barceloux, a bankrupt, do have and recover from defendant Peter Barceloux Company, a corporation, a sum, in lawful money of the United States of America, equal to the aggregate highest value of the following property, to wit:

2,499 Shares of the capital stock of Peter Barceloux Company, a corporation formed, organized and existing under and by virtue of the laws of the State of California,

100 Shares of the capital stock of Glenn County Garage Company, a corporation formed, organized and existing under and by virtue of the laws of the State of California,

9 Shares of the capital stock of the Bank of Orland, a [31] corporation formed, organized and existing under and by virtue of the laws of the State of California,

75 Shares of the capital stock of Pacific National Fire Insurance Company, a corporation formed, organized and existing under and by virtue of the laws of the State of California,

during the period commencing August 16, 1926, to and including the date of the filing and approval by this court of the audit or report of the auditor or master hereinafter appointed, together with costs of suit. Costs to date taxed at $112.20.

That for the purpose of taking said audit Mr. H. N. Barton, of the city of Sacramento, county of Sacramento, State of California, be and he is hereby appointed as auditor or master, who, upon taking his oath as such auditor or master, be and he is hereby given full authority to examine, upon oath, the parties in the cause and other necessary persons, touching all matters contained in this reference, and with the right to require the production of all books, papers, writings, vouchers, or

other documents belonging to the defendant or others applicable to the above-described property, or its values, and also, to examine, on oath *viva voce,* all witnesses produced by the parties before him or by deposition, according to the acts of Congress, or otherwise, and also to direct the mode in which the matters requiring evidence shall be proved before him, and, generally, to do all other acts and things and direct all other inquiries and proceedings in the matter before him which he may deem necessary and proper to the justice and merits thereof and the rights of the parties; that said auditor or master shall return to or file with the Clerk of this court his audit and report showing the highest aggregate value of the property and stocks hereinbefore [32] mentioned during said period, as soon as the same is ready, and said audit and report shall be presented to this court for confirmation and approval and final decree be made and entered in accordance therewith in accordance with the interlocutory decree, in the time and manner provided for by the rules of this court.

That this court shall, and it does hereby, retain jurisdiction of the above-entitled cause until said audit and report is so approved and final decree entered with the right to modify, amend, or add to this decree in such manner and respect as this court may deem meet and proper; that the said auditor or master herein appointed shall be allowed a reasonable compensation for his services which shall be hereinafter fixed by this court; that such com-

pensation, together with all costs and expenses incurred by said auditor, shall be charged upon and borne by the defendant.

That no part of the moneys that may be collected by the plaintiff pursuant to this decree or the final decree in this matter shall be devoted, in whole or in part, to the payment of any claim or claims of the defendant which is now or may hereafter be presented, and/or allowed in the matter of Henry Joseph Barceloux, bankrupt, which latter proceeding is now pending in this court, until all claims of other creditors of said bankrupt existing on the 16th day of August, 1926, together with all reasonable allowances, commissions and costs and expenses of administration in said bankruptcy proceedings, shall have been paid in full.

Dated, August 5, 1929.

BOURQUIN,
Judge.

[Endorsed]: Filed and entered Aug. 8, 1929. [33]

[Title of Court and Cause.]

NOTICE OF ENTRY OF INTERLOCUTORY DECREE.

To the Above-named Defendants and to W. T. Belieu, Esq., Attorney for Defendants:

You, and each of you, will please take notice that on the 5th day of August, 1929, the above-entitled court duly signed and made the interlocutory de-

cree in the above-entitled matter, a copy of which is hereto attached, and by reference thereto made a part hereof for every purpose, and that said interlocutory decree was duly and regularly entered in said United States District Court on the 8th day of August, 1929.

Dated, August 9th, 1929.

DEVLIN & DEVLIN & DIEPENBROCK,
GEO. R. FREEMAN and
H. B. WULFF,
Attorneys for Complainant. [34]

In the Northern Division of the United States District Court in and for the Northern District of California.

No. 263—EQUITY.

F. E. BUFFUM as Trustee in Bankruptcy of HENRY JOSEPH BARCELOUX, a Bankrupt,

Complainant,

vs.

PETER BARCELOUX COMPANY, a Corporation, and GEORGE R. FREEMAN, as Administrator of the Estate of FRANK FREEMAN, Deceased,

Defendants.

INTERLOCUTORY DECREE.

This cause came on to be heard at this term and was, in accordance with the order of this court, submitted on briefs, and now, after consideration

thereof, IT IS ORDERED, ADJUDGED AND DECREED as follows, viz.:

That the complainant F. E. Buffum, as Trustee in Bankruptcy of Henry Joseph Barceloux, a bankrupt, do have and recover from defendant Peter Barceloux Company, a corporation, a sum, in lawful money of the United States of America, equal to the aggregate highest value of the following property, to wit:

2,499 shares of the capital stock of Peter Barceloux Company, a corporation formed, organized and existing under and by virtue of the laws of the State of California,

100 shares of the capital stock of Glenn County Garage Company, a corporation formed, organized and existing under and by virtue of the laws of the State of California,

9 shares of the capital stock of the Bank of Orland, a corporation formed, organized and existing under and by virtue of the laws of the State of California,

75 shares of the capital stock of Pacific National Fire Insurance Company, a corporation formed, organized and existing under and by virtue of the laws of the State of California, [35]

during the period commencing August 16, 1926, to and including the date of the filing and approval by this Court of the audit or report of the auditor or master hereinafter appointed, together with costs of suit. Costs to date taxed at $112.20;

That for the purpose of taking said audit Mr. H. N. Barton, of the city of Sacramento, county of Sacramento, State of California, be and he is hereby appointed as auditor or master, who, upon taking his oath as such auditor or master, be and he is hereby given full authority to examine, upon oath, the parties in the cause, and other necessary persons, touching all matters contained in this reference, and with the right to require the production of all books, papers, writings, vouchers, or other documents belonging to the defendant or others applicable to the above-described property, or its values, and also, to examine, on oath *viva voce,* all witnesses produced by the parties before him or by deposition, according to the acts of Congress, or otherwise, and also to direct the mode in which the matters requiring evidence shall be proved before him, and, generally, to do all other acts and things and direct all other inquiries and proceedings in the matter before him which he may deem necessary and proper to the justice and merits thereof and the rights of the parties; that said auditor or master shall return to or file with the Clerk of this court his audit and report showing the highest aggregate value of the property and stocks hereinbefore mentioned during said period, as soon as the same is ready, and said audit and report shall be presented to this court for confirmation and approval and final decree be made and entered in accordance therewith and in accordance with the interlocutory decree, in the time and manner provided for by the rules of this court. [36]

That this court shall, and it does hereby, retain jurisdiction of the above-entitled cause until said audit and report is so approved and final decree entered with the right to modify, amend, or add to this decree in such manner and respect as this court may deem meet and proper; that the said auditor or master herein appointed shall be allowed a reasonable compensation for his services which shall be hereinafter fixed by this court; that such compensation, together with all costs and expenses incurred by said auditor, shall be charged upon and borne by the defendant.

That no part of the moneys that may be collected by the plaintiff pursuant to this decree or the final decree in this matter shall be devoted, in whole or in part, to the payment of any claim or claims of the department which is now or may hereafter be presented, and/or allowed in the matter of Henry Joseph Barceloux, Bankrupt, which latter proceeding is now pending in this court, until all claims of other creditors of said bankrupt existing on the 16th day of August, 1926, together with all reasonable allowances, commissions and costs and expenses of administration in said bankruptcy proceedings, shall have been paid in full.

Dated, August 5, 1929.

BOURQUIN,
Judge.

[Endorsed]: Filed Aug. 8, 1929. [37]

[Endorsed]: Filed Aug. 14, 1929. [38]

[Title of Court and Cause.]

ADMISSION OF SERVICE.

Due and personal service and receipt of copy of notice of entry of interlocutory decree is hereby admitted this 10th day of August, 1929.

PERCY NAPTON,
W. T. BELIEU,
Attorneys for Defendants.

[Endorsed]: Filed Aug. 12, 1929. [39]

[Title of Court and Cause.]

OATH OF OFFICE OF H. N. BARTON AS AUDITOR OR MASTER.

State of California,
County of Sacramento,—ss.

I, H. N. Barton, having been duly and regularly appointed by the above-entitled court in the interlocutory decree in the above-entitled matter, which was duly made and entered on the 8th day of August, 1929, a copy of which decree is hereby attached and by reference made a part hereof, to the office of Auditor and/or Master, do solemnly swear that I will support the constitution of the United States of America and the constitution of the State of California, and I will faithfully discharge and perform the duties of Auditor and/or Master to the

best of my ability, and according to law, so help me, God.

H. N. BARTON.

Subscribed and sworn to before me this 8th day of August, 1929.

[Seal] F. M. LAMPERT,

Deputy Clerk, United States District Court, North District of California. [40]

In the Northern Division of the United States District Court in and for the Northern District of California.

No. 263—EQUITY.

F. E. BUFFUM, as Trustee in Bankruptcy of HENRY JOSEPH BARCELOUX, a Bankrupt,

Complainant,

vs.

PETER BARCELOUX COMPANY, a Corporation, and GEORGE R. FREEMAN, as Administrator of the Estate of FRANK FREEMAN, Deceased,

Defendants.

INTERLOCUTORY DECREE.

This cause came on to be heard at this term and was, in accordance with the order of this Court, submitted on briefs, and now, after consideration thereof, IT IS ORDERED, ADJUDGED AND DECREED as follows, viz.:

That the complainant F. E. Buffum, as Trustee in Bankruptcy of Henry Joseph Barceloux, a bankrupt, do have and recover from defendant Peter Barceloux Company, a corporation, a sum, in lawful money of the United States of America, equal to the aggregate highest value of the following property, to wit:

2,499 shares of the capital stock of Peter Barceloux Company, a corporation formed, organized and existing under and by virtue of the laws of the State of California,

100 shares of the capital stock of Glenn County Garage Company, a corporation formed, organized and existing under and by virtue of the laws of the State of California,

9 shares of the capital stock of the Bank of Orland, a corporation formed, organized and existing under and by virtue of the laws of the State of California,

75 shares of the capital stock of Pacific National Fire Insurance Company, a corporation formed, organized and existing under and by virtue of the laws of the State of California, [41]

during the period commencing August 16, 1926, to and including the date of the filing and approval by this Court of the audit or report of the auditor or master hereinafter appointed, together with costs of suit. Costs to date taxed at $112.20.

That for the purpose of taking said audit Mr. H. N. Barton, of the city of Sacramento, county of Sacramento, State of California, be and he is

hereby appointed as auditor or master, who, upon taking his oath as such auditor or master, be and he is hereby given full authority to examine, upon oath, the parties in the cause and other necessary persons, touching all matters contained in this reference, and with the right to require the production of all books, papers, writings, vouchers, or other documents belonging to the defendant or others applicable to the above-described property, or its values, and also, to examine, on oath *viva voce,* all witnesses produced by the parties before him or by deposition, according to the acts of Congress, or otherwise, and also to direct the mode in which the matters requiring evidence shall be proved before him, and, generally, to do all other acts and things and direct all other inquiries and proceedings in the matter before him which he may deem necessary and proper to the justice and merits thereof and the rights of the parties; that said auditor or master shall return to or file with the Clerk of this court his audit and report showing the highest aggregate value of the property and stocks hereinbefore mentioned during said period, as soon as the same is ready, and said audit and report shall be presented to this court for confirmation and approval and final decree be made and entered in accordance therewith and in accordance with the interlocutory decree, in the time and manner provided for by the rules of this court. [42]

That this court shall, and it does hereby, retain jurisdiction of the above-entitled cause until said audit and report is so approved and final decree

entered with the right to modify, amend, or add to this decree in such manner and respect as this court may deem meet and proper; that the said auditor or master herein appointed shall be allowed a reasonable compensation for his services which shall be hereinafter fixed by this court; that such compensation, together with all costs and expenses incurred by said auditor, shall be charged upon and borne by the defendant.

That no part of the moneys that may be collected by the plaintiff pursuant to this decree or the final decree in this matter shall be devoted, in whole or in part, to the payment of any claim or claims of the defendant which is now or may hereafter be presented, and/or allowed in the matter of Henry Joseph Barceloux, bankrupt, which latter proceeding is now pending in this court, until all claims of other creditors of said bankrupt existing on the 16th day of August, 1926, together with all reasonable allowances, commissions and costs and expenses of administration in said bankruptcy proceedings, shall have been paid in full.

Dated, August 5, 1929.

BOURQUIN,
Judge.

[Endorsed]: Filed Aug. 8, 1929. [43]

[Title of Court and Cause.]

REPORT OF AUDITOR AND/OR MASTER.

To the Honorable Judge of the Northern Division of the United States District Court, in and for the Northern District of California:

The undersigned, H. N. Barton, who was duly and regularly appointed Auditor and/or Master by the above-entitled court under and by virtue of the interlocutory decree which was duly and regularly made and entered in the above-entitled action on the 5th day of August, 1929, to find and determine the aggregate highest value of the following property:

2,499 Shares of the capital stock of Peter Barceloux Company, a corporation formed, organized and existing under and by virtue of the laws of the State of California,

100 Shares of the capital stock of Glenn County Garage Company, a corporation formed, organized and existing under and by virtue of the laws of the State of California,

9 Shares of the capital stock of the Bank of Orland, a corporation formed, organized and existing under [45] and by virtue of the laws of the State of California,

75 Shares of the capital stock of Pacific National Fire Insurance Company, a corporation formed, organized and existing under and by virtue of the laws of the State of Califorina,

during the period commencing August 16, 1926, to and including the date of the filing and approval of the above-entitled court of this audit and report, respectfully submits the following audit and report:

That I have proceeded to audit and investigate the matter so referred to me under and pursuant to said interlocutory decree, and for that purpose have held, upon due notice given, hearings before me on the following dates:

November 7 and 8, 25 and 26, and December 6, 1929, at each of which I had them attended by the parties hereto and their respective counsel, and by numerous witnesses produced by said respective parties, and that evidence both oral and documentary having been introduced, and the corporate books of said defendants having been duly and fairly audited by me, and being duly advised, I hereby find and report as follows:

1. That the highest aggregate value of all of said properties and corporate stocks during the period commencing with said 16th day of August, 1926, and ending at the date hereof, was the sum of One Hundred Six Thousand Four Hundred Nine and 44/100ths Dollars ($106,409.44).

2. That said defendant Peter Barceloux Company, a corporation, should be decreed to pay the complainant in accordance with said interlocutory decree, the sum of One Hundred Six Thousand Four Hundred Nine and 44/100ths Dollars ($106,-409.44), besides costs heretofore fixed and to be fixed herewith. [46]

3. That I respectfully refer to schedules A, B, C and D, hereto annexed and by this reference made a part of this report.

All of which is respectfully submitted,

H. N. BARTON,
Auditor and/or Master.

Dated: May 8, 1930. [47]

SCHEDULE A.

STATEMENT OF ASSETS AND LIABILITIES OF PETER BARCELOUX COMPANY (a Corporation).

ASSETS.	Book Accounts Aug. 16, 1926	Evidence Valuations Aug. 16, 1926	Highest Aggregate Value Sept. 26, 1929
Glenn County Bank (P30 C. B..)	$1,336.57	$ 1,336.57	$ ———
Bank of Orland (P3 C. B.)	381.39	381.39	1,210.34
Home Ranch	120,670.00	170,000.00	170,000.00
Longmire Ranch	77,190.00	99,200.00	99,200.00
Barceloux Building & Lot	24,786.68	30,000.00	30,000.00
Garage Building	3,366.68	6,000.00	6,000.00
Home Residence	2,300.00	5,000.00	5,000.00
Rice Camp Bldgs. & Machinery	2,002.42	———	———
Florenzo House	760.00	1,500.00	1,500.00
Blakeley Land	2,884.20	2,000.00	2,000.00
Dunlap Land	1,089.02	750.00	750.00

ASSETS.	Book Accounts Aug. 16, 1926	Evidence Valuations Aug. 16, 1926	Highest Aggregate Value Sept. 26, 1929
North Willows Lots	$ 100.00	$ 100.00	$ 50.00
Sheep Account	4,619.50	4,619.50	4,275.50
Garage, Machinery & Tools	1.00	1.00	———
Notes Receivable	76,769.78	36,888.10	36,664.37
Orland Bank Land Agreement	2,304.60	———	———
Cattenberg Land Agreement	4,500.00	———	———
Stocks	23,111.82	20,800.00	29,107.71
Savings Deposits—Bank of Orland	3,880.06	3,947.46	3,727.74
Savings Deposits—Glenn County Bank	5,465.87	5,575.19	———
Geo. F. St. Louis	105.42	105.42	105.42
Earnest Barceloux	76.71	76.71	———
Barceloux Bros.	3,435.24	1,717.62	288.55
Elmer Barceloux	———	———	747.17
Inventory—Wheat & Barley	———	———	5,204.64
TOTALS	$361,136.96	$389,998.96	$395,811.44

	Book Accounts Aug. 16, 1926	Evidence Valuations Aug. 16, 1926	Highest Aggregate Value Sept. 26, 1929
LIABILITIES.			
Bills Payable	$ 1,400.00	$ 1,400.00	———
Elmer Barceloux	49.56	49.56	———
Geo. A. Barceloux	305.00	305.00	———
Cora P. Gelinas	460.00	460.00	———
H. Pickett	5.00	5.00	———
Lumina Barceloux (contract)	———	7,828.77	$ 3,186.77
TOTALS	$ 2,219.56	$ 10,048.33	$ 3,186.77
CAPITAL.			
Capital Stock issued	100,000.00	100,000.00	100,000.00
Surplus & Undivided Profits	258,917.40	279,950.63	292,624.67
	$361,136.96	$389,998.96	$395,811.44

SCHEDULE B.

STATEMENT OF NOTES RECEIVABLE OF PETER BARCELOUX COMPANY (a Corporation).

NAME.	Book Amounts Aug. 16, 1926	Evidence Valuations Aug. 16, 1926	Highest Aggregate Value Sept. 26, 1929
Geo. A. Barceloux	$ 5,000.00	$ 5,000.00	$ ———
Sacramento Valley Realty	2,305.45	———	———
H. J. Barceloux	2,000.00	———	———
F. B. Glenn (Barrett & Nancy Small)	10,000.00	2,000.00	———
M. and Ethel Fortini	4,000.00	4,000.00	4,000.00
H. J. and G. A. Barceloux	1,000.00	500.00	———
C. B. Bogue	658.75	———	———
J. L. Kann	96.56	96.56	———
H. J. and G. A. Barceloux	3,500.00	1,750.00	———
C. B. Bogue	103.00	———	———

NAME.	Book Amounts Aug. 16, 1926	Evidence Valuations Aug. 16, 1926	Highest Aggregate Value Sept. 26, 1929
H. J. and G. A. Barceloux	$ 1,000.00	$ 500.00	$ ———
Roy Collins	145.00	145.00	———
W. A. Knowles	750.00	750.00	———
W. H. Hooper	241.80	241.80	———
Vernon Barceloux	300.00	300.00	554.19
C. J. Barceloux	300.00	300.00	468.57
Elmer Barceloux	12,904.74	12,904.74	15,985.16
Elmer Barceloux	300.00	300.00	———
H. J. Barceloux	24,064.48	———	———
A. J. Lewis & Mary Lewis	6,000.00	6,000.00	6,000.00
Elmer Barceloux	200.00	200.00	———
Elmer Barceloux	150.00	150.00	———
Elmer Barceloux	250.00	250.00	———

NAME.	Book Amounts Aug. 16, 1926	Evidence Valuations Aug. 16, 1926	Highest Aggregate Value Sept. 26, 1929
M. and Ethel Fortini	$ 1,500.00	$ 1,500.00	$ 1,500.00
E. B. Neelson	———	———	425.00
E. J. Barceloux	———	———	2,637.78
Vernon Barceloux	———	———	5,073.67
	$76,769.78	$36,888.10	$36,644.37

[49]

SCHEDULE C

STOCKS OWNED BY PETER BARCELOUX CO.

August 16, 1926.

Kind	No. Shares	Share Value	Amount	Total
Glenn County Bank	107	$ 70.00	$7,490.00	
Bank of Orland	75	100.00	7,500.00	
Sacramento San Joaquin or United Bank & Trust Co.	35	166.00	5,810.00	$20,800.00

STOCKS OWNED BY PETER BARCELOUX CO.

September 26, 1929.

Kind	No. Shares	Share Value	Amount	Total
Transamerica (New)	542	$ 67,375	$36,517.25	
Sacramento Valley Realty Company	828.33	———	———	$36,517.25
Less: (Stocks stated separately in interlocutory decree:)				
9 shares Bank of Orland turned into 4.64 shares United Bank & Trust Co.				
6/28/29 Turned into Transamerica @ 1⅓ T. A. C. for 1 U. B. & Tr. Co.	6.187			
7/25/29 1% stock dividend	.062			
	6.249			
9/10/29 150 Stock dividend	9.373			
9/26/29 Total	15.622	67.375	1,052.53	

Kind	No. Shares	Share Value	Amount	Total
74 shares Pacific National Fire Insurance Co. turned into 37 shares Transamerica.	37.			
7/25/29 1% Stock dividend.....	.37			
	37.37			
9/10/29 150% stock dividend.....	56.055			
9.26.29 Highest Value.....	93.425	67.375	6,294.51	
1 share Pacific National sold for cash.....			62.50	7,409.54
Amount Applicable in Determining Value of Peter Barceloux capital stock.....				$29,107.71

SCHEDULE D.

SUMMARY OF CAPITAL STOCKS AS RECITED IN INTERLOCUTORY DECREE AND VALUES THEREOF.

Kind of Stocks	Value August 16, 1926	Highest Aggregate Value Sept. 26, 1929
2499 Shares capital stock of Peter Barceloux Company	$94,949.66	$98,116.90
100 Shares capital stock of Glenn County Garage Company	883.00	883.00
9 Shares capital stock of Bank of Orland (and later Transfers and accretions)	900.00	1,052.53
75 Shares capital stock of Pacific National Fire Insurance Company (and later Transfers and accretions)	375.00	6,357.01
	$97,107.66	$106,409.44

NOTE: In determining values of capital stock of Bank of Orland at commencement of period of audit (August 16, 1926), a value of $100.00 per share has been used, same being based on a contract made the 9th day of December, 1927, between certain stockholders of the Bank of Orland and the French American Corporation at a consideration of $100.00 per share of the capital stock of Bank of Orland, and a further consideration of $50.00 per share withheld as a work-out of certain assets of the Bank of Orland. There was no evidence submitted which would prove the value of the work-out of assets, therefore any value of same has been excluded in the calculations for the period under review. [51]

NOTE: In determining values of the capital stock of Glenn County Bank at commencement of period of audit (August 16, 1926), a value of $70.00 per share has been used, same being based on an agreement made the 22d day of October, 1926 between certain stockholders of Glenn County Bank and Bancitaly Corporation at a consideration of $70.00 per share of the capital stock of Glenn County Bank in cash, and a further consideration of $55.00 per share withheld as a guarantee of certain assets of Glenn County Bank. There was insufficient evidence to prove the value of this work-out of assets, and any value that may be attached to same has not been included in the valuation of the capital stock of the Glenn County Bank as stated in this report. [52]

Pursuant to the written stipulations of the parties in the above-entitled actions heretofore filed, a

draft of the foregoing report was served upon the attorneys of the respective parties on the 8th day of May, 1930, and that I, as said Auditor and Master, fixed the 29th day of May, 1930, at the hour of 10:00 o'clock A. M. as the time of hearing of the objections and exceptions or suggestions of amendments to or alterations to said draft that may be made by any of the respective parties, and notice of said hearing was served upon all the parties hereto on said 8th day of May, 1930.

That pursuant to said notice a hearing was held before me on said 29th day of May, 1930, and Arthur C. Huston and Percy Napton appearing as attorneys for the defendant Peter Barceloux Company, and George R. Freeman and Horace B. Wulff as attorneys for plaintiff; that said respective parties presented to me written objections and exceptions and amendments to said audit and report, and all objections and exceptions and amendments of the respective parties have been fully considered by me, and being fully advised, I find that all of said objections and exceptions and amendments thereto are and each of them is without merit, and the same and each of them be, and they are and each of them is, hereby denied and rejected.

That attached to and made a part hereof are the written objections and exceptions and proposed amendments to said report filed with me by the respective parties, and contemporaneously with the filing of the foregoing report and audit with the Clerk of the above-entitled court, I also filed transcripts of testimony introduced at all hearings held by me, and all documents, books and ledgers and

other exhibits introduced in evidence at said hearings.

Dated, May 29th, 1930.

H. N. BARTON,
Auditor and/or Master.

[Endorsed]: Filed May 29, 1930. [53]

[Title of Court and Cause.]

EXCEPTIONS TO REPORT OF MASTER.

Now comes the defendant, Peter Barceloux Company, a corporation, and excepts to the report of H. N. Barton, Master, dated May 8th, 1930, and for cause of exception shows:

First: That the Master has in his said report stated and certified the highest aggregate value of all of said properties and corporate stocks referred to in the interlocutory decree herein during the period commencing with the 16th day of August, 1926, and ending at the date of the said report to be the sum of One Hundred Six Thousand Four Hundred Nine and 44/100 Dollars ($106,409.44); that the Master ought to have found the value of the properties and stocks referred to in the interlocutory decree herein to be the sum of —— Dollars ($——); that the said Master did not find, determine or ascertain the highest market value of said property referred to in said interlocutory decree in the condition in which it was at the time of the transfer thereof, to wit: August 16th, 1926, but on the contrary, has [54] found the highest

market value of the assets of said corporation, some of which were not owned or possessed by said corporation on August 16th, 1926, and were of greater value after August 16th, 1926; that the said Master did not determine the highest market value, or any market value of the stocks referred to in the said interlocutory decree in the condition in which said stocks were at the time of the transfer; that the said Master has not found the highest market value, or any market value of the shares of stock of the Peter Barceloux Company referred to in said interlocutory decree and in the said report, in the condition in which said stocks existed at the time of said transfer on August 16th, 1926, nor has he made a finding based upon the value of the assets and also of the liabilities of said corporation as they existed on August 16th, 1926; that the finding of said Master does not determine the value of the stocks referred to in said interlocutory decree.

Second: That instead of following the directions of the interlocutory decree and finding the highest market value of the capital stock of the Peter Barceloux Company, referred to therein, the said Master has placed a value on each asset of the corporation, and deducted therefrom the liabilities of said corporation as determined by him, and taken the balance as the highest market value of such stock; that the said Master in determining the value of said stock has disregarded the evidence that the corporation was a family corporation, that the said capital stock was not earning any dividends, that the said capital stock was a minority holding; that

the said capital stock was subject to a contract entered into between Lumina Barceloux and the said Peter Barceloux Company (being Defendant's Exhibit No.——), reserving all of the rents, issues and profits and the income from all of the real and personal property owned by said corporation; that the said Master has not found either the actual or [55] market value of the capital stock of the Peter Barceloux Company; that the finding of the said Master is contrary to and unsupported by the evidence.

Third: That for the purpose of ascertaining and fixing the value of the capital stock of the Peter Barceloux Company, the said Master received evidence of witnesses as to the value of the real estate; that the following is a synopsis of the testimony offered on the part of the plaintiff as to the value of the real estate:

JOHN H. GRAVES, who has resided in Glenn County for forty-three years and in the town of Willows for thirty-seven years, and whose occupation was that of farmer and *abstract* of title, and who was also inheritance tax appraiser, testified that the market value of the property referred to as the "Home Ranch" in the report was the sum of one hundred seventy thousand dollars ($170,000.-00) (Volume 1 of the Transcript, page 52), that the value of the Longmire Ranch was the sum of ninety-nine thousand two hundred dollars ($99,-200.00).

Volume 1 of the Transcript, page 57.

The witness testified to his familiarity with the situation of the land and improvements.

He testified that he had never been over that part of the Home Ranch east of the canal to make an examination of the soil type; that the only crops he had observed on the lands were rice crops during the last two or three years; that was the only agricultural purpose to which it had ever been devoted; that he had never seen a crop of wheat or barley grow on the three hundred and twenty acres east of the canal; that he had never measured it, and it had the reputation of being an alkali field; that there was a very marked difference in the type of land in [56] the home place east and west of the canal; that the lands lying east of the canal are inferior in quality; that he placed an average on a thousand acres at fifty dollars ($50.00) an acre, and didn't think there had been any change since August 16th, 1926.

Volume 1, Transcript, page 72.

He was asked and admitted that he had given the following testimony before Judge Bourquin:

"Q. Do you remember these questions being asked you before Judge Bourquin, in the Federal Court:

What in your opinion was the value of that home place per acre on the 16th day of April, 1926?

A. Well, there is about I should judge eight hundred or a thousand acres of it in the drainage district and in the Glenn-Colusa District.

Q. Give us the value.

A. About a thousand acres I would put it at forty or fifty dollars and the other eleven hundred about seventy-five to one hundred dollars an acre.

Q. Which is the land value, in your opinion, forty or fifty dollars an acre?

A. Averaging it, I said fifty dollars.

Q. Why did you say forty then?

Mr. FREEMAN.—He didn't say forty then. He said 'forty or fifty.'

Mr. BELIEU.—Now he says fifty.

A. It is only my opinion. I am not an expert in soil conditions, but from the sales of land made in the county and through this territory I am merely giving my opinion of the value of the land." [57]

The witness further testified on cross-examination that he wouldn't say that this three hundred and twenty acres was worth fifty dollars an acre by virtue of any products, or because of any sales of like or similar soil type in the vicinity; that there had been no sales of lands of that soil type; that the market value of the lands east of the canal was about fifteen dollars an acre; that he understood the irrigation debt against the land was fourteen dollars or fifteen dollars an acre; that he didn't think it was either nineteen or twenty dollars an acre; that he finally admitted that the debt was twenty-nine dollars an acre; he testified in regard to sales of the Ellison land.

Volume 1, Transcript, page 77.

That as to the thousand acres on which he placed a valuation of fifty dollars an acre, several hundred acres had been in rice for several years, he did not know how many years, but only knew of two crops grown on it. He did not know that the land had been cropped before 1929. He referred to the sale

of the W. J. Pierson Ranch at fifty dollars an acre, and also the Joe Gannion place. He did not know how many acres of the Pierson ranch had been purchased, nor how much had been paid. He could not recall any sales of similar soil type and similarly situated as the lands west of the canal for fifty dollars an acre.

Volume 1, Transcript, page 80.

He testified that it was true that when you got more than eighty acres of land in the Glenn Colusa Irrigation District you were considered to have an elephant on your hands and that it was a drug on the market and would not carry itself. He explained that that was the way citizens looked upon the lands in the district, but when you hear of other people in the state fighting for water in the San Joaquin Valley and other places in the state, some claim the land to be worth one hundred dollars an [58] acre if they had water on it.

Volume 1, Transcript, page 81.

The witness could only indicate one sale of lands similar in type and quality for the figure of fifty dollars an acre for the last five years. He said he based his statement of the value of the home ranch at one hundred dollars an acre because the two Snowden sections next to it were mortgaged for ninety dollars an acre to the Bank of Willows; that he did not know whether the ranch had been abandoned to the Bank.

Volume 1, Transcript, page 84.

He did not base his opinion upon the productivity of the land, but said that the land has a holding

value, as well as producing value; that he did not know what the productivity of the Barceloux place had been in the last ten years, and had never had any occasion to investigate it.

Volume 1, Transcript, page 85.

He was not acquainted with the taxes on the home place and did not know the purpose for which the land was used or had been used in the past, or whether that entered into his estimation of the value.

Volume 1, Transcript, page 89.

That he was of the opinion that the land would produce eighteen to twenty sacks of barley if dry cropped. He testified that if the land were cultivated every third year by a practical farmer to wheat and barley, that the annual yield or average yield of eight or nine sacks of barley, and from five to six sacks of wheat on one-third of it, with the present price of grain, his opinion would not be influenced because there were different types of farmers. He also stated that his opinion was in part based on the assessed value of the land.

He said he knew of a sale of forty acres of land on the highway, similar in type, to the Longmire Ranch from J. H. Ball [59] to J. E. Knight for fifty-five dollars an acre; that he knew of a sale of three thousand acres of the Glide land for forty dollars an acre, and that one or two of the flat sections were held ba*d*k because they asked one hundred dollars an acre for it; that some of the Glide land was rolling hills; that he knew of the Willard purchase of the Ellis land of fifteen hundred thirty-

five acres for fifty dollars an acre; that there was no market in the Valley here for farming purposes, unless you find a party who wants it.

Volume 1, Transcript, pages 96 to 98.

That agricultural conditions all over the country are in a bad shape; that because you simply refuse to farm land because it costs too much is no reason why the land is not worth anything.

He stated that he did not remember whether he appraised the Longmire ranch for the Government at sixty dollars an acre.

With reference to the value of the Barceloux building, he did not know what it cost to erect it in 1910, and when asked if it could be sold stated, "Well, you can't sell anything,—that is no reason why it isn't worth anything. I can show you two buildings in 1893 cost $8,000.00 and both of them sold at four thousand, simply because they were vacant and the man wanted to get rid of them."

He made the following answer to the following question:

"Q. That is what you have to do, give it away in the market to-day.

A. Pretty near, in some cases."

The witness did not remember the value he gave on the property when he testified at the trial of this action. He testified that it was worth from thirty to thirty-five thousand dollars. [60]

Volume 1, Transcript, page 101.

The witness did not know the rentals or earnings of the building, or the amount of taxes paid, but said he was taking that in consideration to a

certain extent, and that he was considering the holding value of the building.

Volume 1, Transcript, page 102.

He also testified as follows:

"Q. The holding value of it (the building), its prospective value, largely influenced you,—what it will be worth when things look up?

A. When things are normal.

Q. Things are not normal in lands in this valley now?

A. No. They are twenty-five per cent short of normal. They are all over the Nation."

He testified that in valuing the lands of the home place, he took into consideration the fact that it was in the Glenn Colusa Irrigation District, but did not state what allowance he made for that fact. He assumed that the home ranch was in the district at the time of organization.

He had heard of the suit of the Holland Land Company against the Glenn Colusa Irrigation District, but he did not know that in case of a shortage of water, the lands in the district at the time of its organization had the preference, and that the home ranch coming in after the organization would not receive water. He did not consider this in his opinion; that he was not placing the valuation from an irrigation standpoint, nor that it was susceptible to irrigation.

The witness admitted that he made an affidavit as to the value of this land for H. J. Barceloux when it was being valued by the federal Government for inheritance tax purposes in December,

1918, and also the value of the property of Peter [61] Barceloux and testified in regard thereto as follows:

"I think two or three times Mr. Barceloux and I had the matter up regarding the Federal appraisement, etc., and you know sometimes it has been called to my attention that people will want a very large appraisement sometimes and then they will want a very low appraisement."

That he had made affidavits three or four times for some of them, but he did not know what the affidavit made in connection with the federal tax was.

That the Master's finding that one of the liabilities of the Peter Barceloux Company is the contract for $3,186.77, but that the value of the same on August 16th, 1926, was $7,828.77.

That there is no evidence supporting said finding; that said finding is based upon speculation and not upon facts and that it does not take into consideration the sum or sums of money the said Lumina Barceloux will be entitled to receive under and by virtue of her contract with the said Peter Barceloux Company.

That the Master finds the surplus and undivided profits to be two hundred ninety-two thousand six hundred twenty-four dollars and 67/100 dollars ($292,624.67) on September 26th, 1929.

That said finding is not supported by and is contrary to the evidence in that it is based upon the values of the real property referred to in said report, which values are not supported nor sus-

tained by the evidence, and are contrary to the weight of the evidence.

ERNEST EIBE, county assessor of Glenn County, was called as a witness for the plaintiff and testified that the Home Ranch was of the value of two hundred twenty thousand dollars ($220,000.00) (Volume 1, Transcript, page 149) and that the value of the Longmire Ranch was the sum of one [62] hundred twenty-four thousand dollars ($124,-000.00).

Volume 1, Transcript, page 152.

That he appraised the cash value of the lands; that he had a pretty good idea of the market value of lands.

The cross-examination of this witness appears in Volume 1, of the Transcript, at page 138.

HARLOW M. PLIMPTON was also called as a witness for the plaintiff.

His testimony appears in Volume 2 of the Transcript, beginning at page 392.

Mr. Plimpton was a real estate, grain, wool and insurance broker and was at one time cashier and manager of a local bank for five years; that he had never had any direct dealings with the Barceloux lands, except so far as purchasing grain and that he knew what it had produced in the past.

Volume 2, Transcript, page 392.

That he had not seen the property since 1914.

Volume 2, Transcript, page 396.

He did not know whether the Longmire Ranch or the Home Place had paid profits since 1914.

The defendant called the following witnesses:

H. C. SAMUELS, Volume 2, Transcript, page 398.

This witness farmed from four hundred to fifteen hundred acres of land. He and his brother owned twelve hundred fifteen acres. At the time he testified he was farming twelve hundred acres; that he had bought and sold lands; that he would place a value of thirty dollars per acre on the home place; that the banks would not lend a dollar on it. He valued the Longmire place at forty dollars per acre. His cross-examination appears in Volume 2 of the Transcript, page 405. [63]

The defendant also called a witness J. E. KNIGHT, whose testimony appears in Volume 2 of the Transcript, page 416. This witness had lived in Glenn County for forty years and was engaged in stock-raising and farming. He owned five hundred acres on the Sacramento River. His total land holdings were twenty-five hundred acres. He placed a valuation on that part of the Home Ranch east of the canal at fifteen to twenty dollars an acre, and that part west of the canal at fifty to sixty dollars an acre; and the westerly part and a part of the northeasterly part of the Longmire Place between fifty and sixty dollars an acre, and the rest of the Longmire Place at thirty or forty dollars an acre.

The defendant also called E. E. WILLARD whose testimony appears in Volume 2, of the Transcript, at page 425.

Mr. Willard has resided in Glenn County since 1916, was engaged in farming and livestock. He farmed from four hundred acres to five thousand acres. He placed the value of seventy-seven thousand dollars ($77,000.00) on the Home Place, and forty-nine thousand six hundred dollars ($49,-600.00) on the Longmire Ranch.

The defendant also called CHARLES F. LAMBERT whose testimony appears in Volume 2 of the Transcript, at page 297.

This witness was engaged in irrigation, real estate, colonization and land development enterprises. He was secretary and manager of the Glenn Colusa Irrigation District until 1923. He was intimately acquainted with all the lands in the Glenn Colusa Irrigation District, as well as Reclamation Dstrict No. [64] 2047. The testimony of this witness gives a clear and comprehensive description of land conditions and land values.

Mr. Lambert fixes the value of the Home Place at seventy-three thousand six hundred thirty-five and 70/100 dolars ($73,635.70), and the Longmire Ranch at sixty-four thousand three hundred forty-two and 50/100 dollars ($64,342.50).

The defendant also called the witness JOHN P. RYAN.

His testimony appears in Volume 2 of the Transcript, at page 343. This witness was a civil en-

gineer and resided in Glenn County for thirty-three years, made appraisements for the County Assessor of Glenn County in 1914, and has been fixing valuations on lands in the Sacramento Valley.

The testimony of this witness, like that of Mr. Lambert is also full and comprehensive and gives in detail all of the facts going to make up the market value of the property.

The finding of the Master as to the value of the real property is contrary to the evidence; that such finding is unsupported by the evidence.

Fourth. That the Master erred in overruling the objections of the defendants as follows:

"Q. What is your opinion as to the market value of this property?

Mr. HUSTON.—We make the objection it is irrelevant, incompetent and immaterial. The question here is the value of the stock of the Peter Barceloux Company.

The MASTER.—The objection is overruled. We will have to have a valuation of all the assets before we can ascertain the value.

Mr. HUSTON.—We will take an exception."

Volume 1, Transcript, page 52. [65]

Fifth. That the Master erred in overruling the objection of the defendant as follows:

"*A.* Has there been any change in the market value since August 16th, 1926, to date?

A. I don't think so.

Mr. HUSTON.—We make the objection that it is incompetent, we are only concerned with the value

of the land at the date of the alleged fraud in the two bills filed in the District Court.

The MASTER.—Answer the question. The objection is overruled.

Mr. HUSTON.—We note an exception."

Volume 1, Transcript, page 52.

On page 132 of the Transcript, Volume 1, it was stipulated that this general objection should stand to all of that line of testimony.

Sixth. The Master erred in the following rulings on the motion to strike out and the objections of the defendant:

"Mr. HUSTON.—At this time we move to strike the testimony of this witness upon the following grounds:

First, the witness has not been shown to be qualified to testify as to land values. Second, the fact that he is the County Assessor doesn't qualify him to give his opinion as to land values, and third, the proper hypothetical question was not put to the witness for the purpose of ascertaining the land values and we will ask for a ruling upon the motion.

The MASTER.—It is overruled. The motion is denied.

Mr. HUSTON.—Note our exception to the ruling. We make further motion to strike from the evidence the assessor's list under the authority of Yolo Water and Power Company vs. Edwards, 50 California Appellate, that the assessment-roll was [66] not evidence of land values and also 33 Cal. App.

Mr. WULFF.—We will consent to that being stricken out for the purpose of showing market value.

Mr. BELIEU.—That's what you were testifying about, wasn't it?

Mr. WULFF.—So far as proving market values, the assessor's assessed valuation was not proof of market value and so far as being introduced as proving market value we will consent to the motion.

Mr. HOUSTON.—Well, does that leave it in or out of the record?

Mr. WULFF.—It remains in for the reason we are taking testimony in a Special Master's proceeding in equity and the Master has a great latitude in taking evidence. If the Master for any reason wants the assessor's valuation of the property he has it, but we didn't introduce it in the first instance as proof of market value, and if you want to strike it out on that ground we will consent to it.

Mr. HOUSTON.—After the motion is granted will the record be in or out? I still don't know if they will be in this record or out of it.

Mr. WULFF.—They are out of the record so far as proof of market value is concerned.

The MASTER.—If it is the wish of the attorneys to leave it out as far as market values are concerned, all right.

Mr. HOUSTON.—The assessment-roll now having been stricken out, we move to strike out the testimony of this witness as to value for the reason it is gained purely and simply upon the knowledge gained from the assessment-roll.

Mr. WULFF.—This witness has qualified himself as an expert [67] as to land values and knowledge of market values and his testimony as to market value is competent evidence.

The MASTER.—That objection is overruled.

Mr. HOUSTON.—We take an exception."

Volume 1, Transcript, page 137.

Seventh.—The Master erred in the following rulings on the objections of the defendant:

"Q. You hand me here an unsigned copy of a contract dated December 9th, 1927, by and between G. A. Barceloux, W. E. Johnson and such other stockholders of the Bank of Orland as sign the agreement, parties of the first part and the French American Corporation, a corporation organized and existing under and by virtue of the laws of the State of California, party of the second part. This contract provides for the sale of the stock of the Bank of Orland at a price of one hundred dollars per share, payable on delivery of the stock, 'and such further consideration as provided herein.' Was the sale made at one hundred dollars per share? A. Yes.

Mr. HOUSTON.—That isn't the proper method of proving the value of any property, and particularly the value of the shares of stock of the Peter Barceloux Company.

Mr. WULFF.—In this matter, one of the matters referred to was the value of nine shares of the Bank of Orland stock in the Peter Barceloux Company case, if my recollection is correct.

Mr. HOUSTON.—Is this testimony directed to the value of certain shares of stock owned by the Peter Barceloux Company?

Mr. WULFF.—This evidence is for the purpose of tracing through assets, following assets.

Mr. HOUSTON.—It is immaterial.

The MASTER.—Mr. Houston, we have to get the value of all the assets of the Peter Barceloux Company before we can ascertain [68] the value of the stock, and anything that is going to be of assistance to the auditor in determining the values will be introduced in evidence. The objection is overruled.

Mr. HOUSTON.—Exception. I wish you to understand our position. Our position in the matter is this: That the proper method of fixing the value of the Peter Barceloux Company shares, which is the subject matter of this action, is by calling for the testimony of qualified witnesses to fix the market value of those shares, taking into consideration not only the assets of the corporation, but all other facts and circumstances surrounding the condition of the corporation, and particularly all contracts going directly to the value of the shares, rather than by attempting to fix them by a piecemeal appraisal of the assets. Our purpose is to save these points so as to be reviewed later, if necessary. I make that explanation so you may understand why we are making these objections.

The MASTER.—It will be understood that the objection should stand to this line of testimony. I suppose it can be done in that manner, and be

overruled and the exceptions noted without interruptions. Yesterday objections were made and exceptions taken and we allowed the testimony because we felt, as an auditor, we need this information."

WHEREFORE defendant Peter Barceloux Company, a corporation, prays that the foregoing exceptions be allowed.

W. T. BELIEU,
HUSTON, HUSTON & HUSTON,
Attorneys for Defendant Peter Barceloux Company, a Corporation.

Service by copy admitted this 29th day of May, 1930.

GEO. R. FREEMAN, and
HORACE B. WULFF,
DEVLIN & DEVLIN & DIEPENBROCK,
Attys. for Plaintiff. [69]

[Title of Court and Cause.]

OBJECTIONS TO DRAFT OF AUDIT AND/OR REPORT OF H. N. BARTON AS AUDITOR AND/OR MASTER.

Now comes the above-named plaintiff and files this his objections and exceptions to the draft of report of auditor and/or master in the above-entitled matter, and for grounds of objections and exceptions specifies as follows:

I.

That there has been omitted from said audit and

report in the fixing of the value of the corporate stock per share of the Peter Barceloux Company, a corporation, the item of twenty-four (24) shares of the capital stock of Intercoast Trading Company, which said stock is listed on the San Francisco curb exchange and its value ascertainable, said stock being acquired by the Peter Barceloux Company and entered on its books as of September 7, 1929. (See Transcript, page 270.)

II.

That there has been omitted from said audit the value as of August 16, 1926, and at all times thereafter to and including September 26, 1929, of the Cartenberg Land Agreement, which agreement vests in the Peter Barceloux Company a one-third interest in and to seventy (70) acres of land situated in the county of Glenn, State of California, and the evidence at the [70] hearings before said auditor shows conclusively that the fair market value of said land is Fifty Dollars ($50.00) per acre, and the fair market value of the Cartenberg Land Agreement is One Thousand One Hundred Sixty-six and 66/100ths Dollars ($1,166.66) at all of said times, which item was not considered in determining the value of the assets of Peter Barceloux Company.

III.

In ascertaining the value of the corporate stock in the Glenn County Bank said auditor has fixed the value of Seventy Dollars ($70.00) per share, based upon the cash portion of the purchase price paid for said stock on October 22, 1926, by the

Bancitaly Corporation, and said auditor entirely ignored the Fifty-five Dollars ($55.00) per share, commonly called the workout, and further ignored the evidence that on August 16, 1926, said stock had a book value of One Hundred Twenty-five Dollars ($125.00) per share, and there being no other evidence introduced by the defendant contradicting said valuation, said amount is binding and conclusive for all matters in this audit, and therefore the value of said stock as of August 16, 1926, should be Fourteen Thousand Four Hundred Fifty-five Dollars ($14,455.00), instead of Seven Thousand Four Hundred Ninety Dollars ($7,490.00).

IV.

In ascertaining the value of the corporate stock of the Bank of Orland, to wit, seventy-five (75) shares as of August 16, 1926, said auditor placed the value of One Hundred Dollars ($100.00) per share, being based upon the contract made on December 9, 1927, between the stockholders of the Bank of Orland and the French American Corporation whereby the latter party [71] purchased said stock for One Hundred Dollars ($100.00) per share cash, and with a further consideration of Fifty Dollars ($50.00) per share as a workout of certain assets; that said auditor ignored the value of said Fifty Dollars ($50.00) per share withheld as a workout, and also ignored the testimony to the effect that as of August 16, 1926, said corporate stock had the book value of One Hundred Twenty-five Dollars ($125.00) per share, and since the defendant did not introduce any evidence contradicting or dis-

puting said book value, said valuation thereof, and the value of said seventy-five (75) shares as of August 16, 1926, should be Nine Thousand Three Hundred Seventy-five Dollars ($9,375.00), instead of Seventy-five Hundred Dollars ($7,500.00). (See Transcript, page 202.)

V.

That said auditor in his report fixed the valuation on the property known as the North Willows Lots at One Hundred Dollars ($100.00) as of August 16, 1926, and at Fifty Dollars ($50.00) as of September 15, 1929; that the evidence shows without dispute that the property consists of two (2) lots, one of which lots was sold on March 24, 1928, for One Hundred Ninety-five Dollars ($195.00), and the evidence further shows that the value of said real property has not changed during all times during the period in question and that the remaining one lot is reasonably worth One Hundred Ninety-five Dollars ($195.00) and not Fifty Dollars ($50.00). (See Transcript, page 205.)

VI.

That said auditor in determining the actual value or worth of the corporate stock of Peter Barceloux Company deducted from the total assets and considered as a part of the liabilities [72] of said corporation a contract between the Peter Barceloux Company and Lumina Barceloux, in the sum of Three Thousand One Hundred Eighty-six and 77/100ths Dollars ($3,186.77) as of September 26, 1927, and the sum of Seven Thousand Eight Hundred Twenty-eight and 77/100ths Dollars ($7,-

828.77) as of August 16, 1926, and the evidence and the law and the construction of the contract does not warrant the same in this:

(a) That said contract has no effect upon the valuation of the corporate stock of Peter Barceloux Company, nor can in any manner be considered as a liability of said corporation.

(b) That the evidence shows without dispute that Lumina Barceloux has waived any rights that she may have had, if any, in and to the rents, issues and profits from the properties of said corporation.

WHEREFORE, the above-named plaintiff prays that the said draft of audit and report of master be modified in accordance with the above objections, and that said report and audit so modified be filed with the Clerk of the above-entitled court.

Dated, May 27, 1930.

GEORGE R. FREEMAN,
H. B. WULFF,
DEVLIN & DEVLIN & DIEPENBROCK,
Attorneys for F. E. Buffum, as Trustee in Bankruptcy of Henry Joseph Barceloux, a Bankrupt. [73]

[Title of Court and Cause.]

AMENDMENT TO OBJECTIONS TO DRAFT OF AUDIT AND/OR REPORT OF H. N. BARTON AS AUDITOR AND/OR MASTER.

Now comes the above-named plaintiff and files this his amendment to his objections and excep-

tions to draft of audit and/or report of Auditor and/or Master in the above-entitled matter, and asks that said objections and exceptions heretofore filed be amended in the following particular, to wit:

That there be eliminated from said objections and exceptions heretofore filed the objection contained in Paragraph II in reference to the purported error in the valuation of the Carterberg Land Agreement, and said plaintiff hereby eliminates all objections to the report of said auditor and/or master in reference to the valuation of said Cartenberg Land Agreement and all right, title and interest that the Peter Barceloux Company may have claimed in and to the lands situated in Glenn County, commonly known and referred to as the Cartenberg lands.

That said plaintiff hereby adopts, approves and affirms each and every item of his objections and exceptions heretofore filed, save and except the objections and exceptions to the item hereby eliminated.

Dated, May 29th, 1930.

DEVLIN & DEVLIN & DIEPENBROCK,
GEO. R. FREEMAN and
HORACE B. WULFF,

Attorneys for F. E. Buffum, as Trustee in Bankruptcy of Henry Joseph Barceloux, a Bankrupt.

[Endorsed]: Filed May 29, 1930. [74]

[Title of Court and Cause.]

PROPOSED AMENDMENTS TO REPORT OF MASTER.

Now comes the defendant, Peter Barceloux Company, a corporation, and proposes the following amendments to the report of the Master herein:

First: Amend Paragraph I so as to make a finding as to the value of the capital stock of the Peter Barceloux Company based upon the condition in which it was on the 16th day of August, 1926, and on the value of the lands as fixed by the defendant's witnesses, and taking into consideration the fact that the corporation was not earning any dividends, was a family corporation, that the stock in question was a minority holding, and that Lumina Barceloux was entitled to all of the rents, issues and profits of all the property belonging to the corporation during the period of her natural life.

Second: Strike out from said report all findings of the value of any capital stock, or other assets acquired by the corporation after August 16th, 1926. [75]

Third. That the Master report to the court a statement of all of the property referred to in said interlocutory decree now in the hands of the said defendant, and as to any property not now in the hands of said defendant, that the Master ascertain and determine the value thereof as of the date of its transfer in the condition in which it was at said time.

WHEREFORE said defendant prays that said report be amended in the foregoing particulars.

W. T. BELIEU,
HUSTON, HUSTON & HUSTON,
Attorneys for Defendant, Peter Barceloux Company, a Corporation.

Copy of within proposed amendments to report of Master received this 29th day of May, 1930.

DEVLIN & DEVLIN & DIEPENBROCK,
HORACE B. WULFF,
GEORGE R. FREEMAN,
Attys. for Plaintiff. [76]

[Title of Court and Cause.]

NOTICE OF MOTION TO VACATE AND SET ASIDE INTERLOCUTORY DECREE.

To the Plaintiff Above Named, and to Messrs. Devlin & Devlin & Diepenbrock, George R. Freeman and Horace B. Wulff, His Attorneys:

YOU AND EACH OF YOU will please take notice that on Monday, the 9th day of June, 1930, at the hour of ten o'clock A. M. of said day, or as soon thereafter as counsel can be heard, at the courtroom of this court in the United States Post Office Building, in the city of Sacramento, State of California, the said defendant will move said court to vacate and set aside the interlocutory decree entered herein on the 8th day of August, 1929, and also to reopen, rehear, reconsider and decide and determine said cause.

That said motion will be made on the following grounds:

First: That by the terms of the said interlocutory decree, the plaintiff is awarded judgment for the aggregate value of all of the property described therein, in lawful money of the United States of America, and H. N. Barton was appointed as Auditor or Master with directions to report "The highest aggregate value of the property and stocks hereinbefore mentioned [77] during said period."

Second. That said interlocutory decree also provides that no part of the moneys that may be collected by the plaintiff pursuant to that decree or final decree shall be devoted in whole or in part to the payment of any claim or claims of the defendant which is now or may hereafter be presented or allowed in the matter of Henry Joseph Barceloux, bankrupt, until all claims of other creditors of said bankrupt existing on the 16th day of August, 1926, together with all reasonable allowances, commissions, costs and expenses of administration in said bankruptcy proceeding shall have been paid in full.

Third. That the complaint herein neither alleges nor prays for punitive or exemplary damages; that the complaint prays that the defendant be required to account for the value of the properties on the date of their transfer, to wit: April 16th, 1926; that the plaintiff recover judgment against the defendant "for the value of all of said shares of stock at the time of said sale, to wit: August 16th, 1926.

Fourth. That neigher at the trial, nor during the argument, *of* in the briefs, or at any other time, did

the plaintiff ask for judgment against the defendant for the highest market value of the said properties, or that the said defendant be deprived of its right to participate in the distribution of the bankrupt's estate; that said defendant has never had any opportunity to be heard or to present its objections to said interlocutory decree in the foregoing respects.

Fifth. That this is an action in equity; that the court is without jurisdiction to render any judgment for damages against the said defendant, or to require the said defendant to pay damages, where the identical stock can be returned to the said plaintiff in said action; that said defendant still has in its possession all of said stock referred to in said complaint. [78]

Sixth. That pursuant to said interlocutory decree, the said Master has determined the highest aggregate value not of the stock referred to in the said complaint in the condition in which it was at the time of said transfer, but based upon his determination of the highest value of the assets of said corporation.

Seventh. That under the evidence and the pleadings, the plaintiff is not entitled, either in law or in equity, to a judgment for damages against said defendant for the value of any stock or property transferred as alleged in said complaint, except as to any stock or property that is not now in the hands or under the control of the said defendant.

That said motion will be made on the records, papers and files in said action.

Dated: June 2d, 1930.

W. T. BELIEU,
HUSTON, HUSTON and HUSTON,
Attorneys for Defendant, Peter Barceloux Company, a Corporation. [79]

[Title of Court and Cause.]

POINTS AND AUTHORITIES ON MOTION TO REOPEN AND REHEAR THE CASE.

Notwithstanding the entry of the interlocutory decree the Court may reconsider the entire case and render such judgment as it may deem proper.

United States vs. Starr, 20 Fed. (2d Series) 803.

Fourniquet et al. vs. Perkins, 14 L. Ed. 854.

Israel vs. Woodruff, 299 Fed. 457.

4 Cyclopedia of Federal Procedure, Sec. 1096.

21 Corpus Juris, 705.

A court of equity has no jurisdiction to render judgment for damages, but should require the defendants to account for the property received.

This point was decided by the Supreme Court of the United States in the case of Dunphy vs. Keinschmidt, 20 L. Ed. 222. We quote the following from page 227 of the opinion:

"Again; in an equitable proceeding of this kind, a decree in the nature of a judgment for damages cannot be rendered [80] against the defendant who is alleged to have taken a fraudulent assignment of the property. The decree against him must

be a decree for an account. He must be called to account for just what property has come into his hands, and no more; and he will be entitled, under ordinary circumstances, to a rebate for the amount that was justly and honestly his due. The mode of taking such an account is well known in equity proceedings. The defendant is to exhibit an account either in his answer or in the Master's office, and if it is not satisfactory to the complainant, it may be surcharged or falsified; and, as the account is finally found to stand, so will the responsibility of the defendant be. But if the complainant wishes to make him answerable in damages, either for the waste of the property or for its disposal by the original proprietor by aid of the wrongful complicity of the defendant, he must sue for damages in an action at law.

This point is also specifically decided in Wasey vs. Holbrook, 125 N. Y. Sup. 1088, which declares the rule to be that where a suit is brought by a trustee in bankruptcy to set aside a transfer of property as fraudulent, a personal judgment can only be given against the transferee when he has done some act which makes it impossible for him to return the property, or has destroyed or impaired its value.

The complaint in this action prays for the value of the property at the time of its transfer, but the interlocutory decree awards judgment for the highest value of the property between the date of the transfer and the date of the audit. This is beyond the relief demanded by the complaint, and is also beyond the jurisdiction of the court in an action

in equity. [81] Furthermore, no facts are alleged or proven which justify a judgment which is equal to punitive damages. Such is the interlocutory judgment in this action for the reason mentioned and also for the further reason that it deprives the defendant or any participation in the distribution of the assets of the bankrupt until after the claims of all creditors existing at the time of the transfer were paid in full.

Furthermore, the defendant has not had the opportunity of being heard in objecting to the granting of such punitive relief. The point was not made in the pleadings, and it was not made in the briefs. This part of the decree was inserted by the Court on its own motion and without any hearing on the subject.

Respectfully submitted,

W. T. BELIEU,

HUSTON, HUSTON and HUSTON,

Attorneys for Defendant, Peter Braceloux Company, a Corporation.

Copy hereof received this day reserving all objections and exceptions thereto and in particular the lack of jurisdiction to consider the motion and that it comes too late.

June 2d, 1930.

GEORGE R. FREEMAN,

H. B. WULFF,

DEVLIN & DEVLIN & DIEPENBROCK,

Attorneys for Plaintiff.

[Endorsed]: Filed Jun. 2, 1930. [82]

[Title of Court and Cause.]

NOTICE OF MOTION.

To the Above-named Plaintiff and to George R. Freeman, H. B. Wulff and Devlin, Devlin & Diepenbrock, Attorneys for Plaintiff Above Named.

You and each of you please take notice that the above-named defendant will move the above-entitled court on Monday June 9, 1930, at the hour of 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled court in the Postoffice Building, situate on the northeast corner of Seventh and "K" Streets, in the city of Sacramento, county of Sacramento, State of California, for an order for the following:

I.

That the exceptions and objections and proposed amendments and proposed findings to the report and audit of the Master, H. N. Barton, which were filed in the above-entitled court on May 29th, 1930, by the above-named defendant herein, and each and all of them be sustained and adopted.

II.

That the exceptions and objections to the report of the Master which were filed by the plaintiff herein and each and all of them be overruled. [83]

III.

That said report or audit as so changed, modified or amended be confirmed.

IV.

That the interlocutory decree hereinbefore rendered and made be set aside and vacated and that the report of said Master be disallowed and for such other, further and different order, judgment and relief as to the court may seem meet and equitable.

PLEASE TAKE FURTHER NOTICE that said motion will be based upon all pleadings, proof, testimony, exhibits, report or audit of said Master or Auditor, and upon all papers and documents now on file in the above-entitled matter with the Clerk of the above-entitled court.

Dated: June 2, 1930.

W. T. BELIEU,
HUSTON, HUSTON and HUSTON,
Attorneys for Peter Barceloux Company, a Corporation.

[Endorsed]: Filed June 3, 1930. [84]

[Title of Court and Cause.]

NOTICE OF MOTION.

To the Above-named Defendant and to W. T. Belieu and Huston, Huston & Huston, Its Attorneys:

You, and each of you, will please take notice that the above-named plaintiff will move the above-entitled court on Monday, June 9, 1930, at the hour of 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled court in the Postoffice Building situate on

the northeast corner of Seventh and "K" Streets in the city of Sacramento, county of Sacramento, State of California, for an order for the following:

I.

That the exceptions and objections and proposed amendments to the report and audit of the Master and/or Auditor H. N. Barton, which were filed with the above-entitled court, on May 29, 1930, by the above-named defendant herein, and each and all of them be overruled.

II.

That the exceptions and objections to the report or audit of the Master and/or Auditor H. N. Barton, which were filed by the plaintiff or complainant herein, and each and all of them, be allowed. [85]

III.

That said report or audit as so changed or amended be confirmed.

IV.

That a final judgment or decree herein be made and entered in conformity to the interlocutory decree and to the report or audit of said Master or Auditor as confirmed, and that the plaintiff or complainant recover his costs and disbursements incurred against said defendant, and for such other, further and different order, judgment and relief as to the Court may seem meet and equitable.

Please take further notice that said motion will be based upon all pleadings, proof, testimony, exhibits, report or audit of said Master or Auditor and all other papers and documents now on file in

the above-entitled matter with the Clerk of the above-entitled court.

Dated, May 31, 1930.

GEORGE R. FREEMAN,
H. B. WULFF,
DEVLIN & DEVLIN & DIEPENBROCK,
Attorneys for F. E. Buffum, as Trustee in Bankruptcy of Henry Joseph Barceloux, a Bankrupt, Plaintiff. [86]

[Title of Court and Cause.]

AFFIDAVIT OF MAILING.

State of California,
County of Sacramento,—ss.

Elmer Laine, being first duly sworn, deposes and says: That at all times herein mentioned he was, and now is, a citizen of the United States of America, over the age of eighteen (18) years, and not a party to the within entitled action, and at all said times resided at and has his office within the city of Sacramento, county of Sacramento, State of California, the place where Messrs. Devlin & Devlin & Diepenbrock, who are appearing as attorneys on behalf of plaintiff in the within entitled action, had and have their offices.

That on the 31st day of May, 1930, he served the within notice of motion on Messrs. Huston, Huston & Huston, attorneys for said defendant, by depositing a copy thereof in the United States Post Office, at said city of Sacramento, enclosed in a sealed envelope, postage prepaid, and addressed to the said

Messrs. Huston, Huston & Huston, at Woodland, California, the place where they at said time had and now have their offices.

Affiant further states that on said day there was due and regular communication by mail between the city of Sacramento and [87] the said city of Woodland.

ELMER LAINE.

Subscribed and sworn to before me this 3d day of June, 1930.

[Seal] GRACE MARTINDALE,
Notary Public in and for the County of Sacramento, State of California.

[Endorsed]: Filed Jun. 4, 1930. [88]

[Title of Court and Cause.]

WITHDRAWAL OF CERTAIN OBJECTIONS AND EXCEPTIONS TO DRAFT OF AUDIT AND/OR REPORT OF H. N. BARTON AS AUDITOR AND/OR MASTER.

Now comes F. E. Buffum, as Trustee in Bankruptcy Henry Joseph Barceloux, a bankrupt, and withdraws and does hereby withdraw from the objections to the draft of audit and/or report of H. N. Barton as Auditor and/or Master, dated May 27, 1930, and filed in the above-entitled court on the 29th day of May, 1930, all those certain objections and exceptions to said audit and report contained in Paragraphs I, II, V and VI, and does hereby confirm, ratify and approve all those certain objec-

tions contained in Paragraphs III and IV set forth in said objections to said draft of said audit and/or report.

Dated, September 10th, 1930.

DEVLIN & DEVLIN & DIEPENBROCK,
GEO. R. FREEMAN,
H. B. WULFF,
Attorneys for Complainant.

[Endorsed]: Filed Sep. 10, 1930. [89]

[Title of Court and Cause.]

ORDER RE CERTAIN MOTIONS, ETC.

ORDERED:

1. That the motion of defendant to vacate and set aside the interlocutory decree be, and the same is hereby denied.

2. That each and every of the motions contained in defendant's notice of motion filed on June 3, 1930, be, and the same is hereby denied.

3. That each and every of the motions contained in complainant's notice of motion filed on July 4, 1930, be, and the same is hereby granted.

4. That the petitions in intervention filed by Elmer Barceloux, Vernon Barceloux, and E. J. Barceloux be, and the same are hereby dismissed.

5. That the compensation of the Auditor and Master is hereby fixed and allowed in the sum of One Thousand Four Hundred Forty-five and 50/-100 (1445.50) Dollars.

Dated: September 3, 1930.

A. F. ST. SURE,
U. S. District Judge.

[Endorsed]: Filed Sep. 4, 1930. [90]

[Title of Court and Cause.]

ORDER CONFIRMING AUDITOR'S REPORT AND FINAL DECREE.

The above-entitled cause having heretofore been tried by consent of all parties by the above-entitled court upon the bill of complaint and upon the answer of the defendant Peter Barceloux Company, the dismissal of the above-entitled cause as to George R. Freeman, as administrator of the estate of Frank Freeman, deceased, having been theretofore made and entered, and evidence having been adduced by the respective parties and the cause being submitted to the court for decision, and the court having made its findings of fact and conclusions of law and ordered the entry of a decree, which instrument was dated July 25, 1929, and filed herein on July 29, 1929, reference to which is hereby made and the same is made a part hereof to the same extent as though the same were fully set forth herein; and

WHEREAS, pursuant to the said findings of fact and conclusions of law a decree was duly and regularly made and entered on August 8, 1929; and

WHEREAS, H. N. Barton, the auditor and/or master of this court who was duly and regularly appointed under and pursuant to said decree to ascertain and report the highest aggregate [91] value of certain personal property and corporate stocks particularly described and set forth in said decree, heretofore filed his report and audit which is dated May 29, 1930; and

WHEREAS, objections and exceptions and proposed amendments to said audit and report of said master were filed on the part of said defendant Peter Barceloux Company, a corporation, and also on the part of said complainant, and the hearing of said objections and exceptions and proposed amendments of the respective parties having been submitted by counsel of the respective parties, and the court being duly advised in the premises and after due deliberation had thereon,—

IT IS NOW ORDERED, ADJUDGED AND DECREED that the objections and exceptions and proposed amendments to said audit and report filed by the defendant Peter Barceloux Company, a corporation, be, and each and all of them are hereby overruled and rejected.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all of the objections and exceptions to the said audit and report filed on the part of the above-named complainant which have not been heretofore withdrawn be, and each and all of them are hereby granted, to wit: that the value as of August 16, 1926, of one hundred seven (107) shares of the capital stock of

Glenn County Bank be and the same is hereby fixed and determined in the sum of Fourteen Thousand Four Hundred Fifty-five Dollars ($14,455.00), or at the rate of One Hundred Twenty-five Dollars ($125.00) per share, instead of the total sum fixed by said auditor or master of Seven Thousand Four Hundred Ninety Dollars ($7,490.00), or seventy Dollars ($70.00) per share, and, further, that the value of the seventy-five (75) shares of the capital stock of the Bank of Orland as of August 16, 1926, be and the same is hereby fixed and determined in the sum of Nine Thousand [92] Three Hundred Seventy-five Dollars ($9,375.00), or at the rate of One Hundred Twenty-five Dollars ($125.00) per share instead of the total sum fixed by said auditor and/or master of Seventy-five Hundred Dollars ($7500.00), or One Hundred Dollars ($100.00) per share; and the audit and report of H. N. Barton as such auditor and/or master be and the same is hereby approved and confirmed as hereinabove modified and amended.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the complainant, F. E. Buffum, as Trustee in Bankruptcy of Henry Joseph Barceloux, a bankrupt, do have and recover from the defendant Peter Barceloux Company the sum of One Hundred Six Thousand Four Hundred Nine and 44/100ths Dollars ($106,409.44), together with costs of suit taxed at One Hundred Seventy-three & 15/100ths Dollars ($173.15), which includes the costs taxed by said decree heretofore entered.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the expenses and compensation of said H. N. Barton as auditor and/or master of this court be and the same are hereby fixed in the sum of One Thousand Four Hundred Forty-five and 50/100ths Dollars ($1445.50), and that said expenses and compensation be paid by the defendant Peter Barceloux Company within ten (10) days after its receipt of notice of the entry of this decree and the receipt of a copy hereof.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that no part of the money that may be collected by the complainant pursuant to this decree shall be devoted in whole or in part to the payment of any claim or claims of the defendant Peter Barceloux Company which is now or may hereafter be presented and/or allowed in the matter of Henry Joseph Barceloux, bankrupt, which latter proceeding is now pending in this court, until all claims of other creditors of said bankrupt existing on the 16th [93] day of August, 1926, together with all reasonable allowances, commissions, and costs and expenses of administration in said bankruptcy proceeding shall have been paid in full.

Dated, September 18, 1930.

A. F. ST. SURE,
Judge.

Approved as to form, as provided in Rule 22.

_____,
Attorneys for Defendant.

[Endorsed]: Filed Sep. 19, 1930. [94]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable A. F. ST. SURE, United States District Judge of the Northern District of California:

The above-named defendant, Peter Barceloux Company, a corporation, feeling itself aggrieved by the decree made and entered in this case on the 19th day of September, 1930, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors filed herewith, and prays that its appeal be allowed, and that a citation issue as provided by law, and that a transcript of the records, proceedings and papers upon which said decree was based duly authenticated may be sent to said United States Circuit Court of Appeals for the Ninth Circuit sitting at the city and county of San Francisco, State of California; and your petitioner further prays that the proper order touching the security to be required by it to perfect its appeal be made; that as to the amount of the security to be required petitioner respectfully represents as follows: [95]

First. That the amount of the judgment in said case is the sum of One Hundred Six Thousand Four Hundred Nine and 44/100 Dollars ($106,409.44).

Second. That the value of the assets and properties of the said petitioner as fixed and determined by this court in this proceeding is the sum of ——.

Third. That of said assets the said corporation is the owner of real estate, the value of which as fixed and determined by this court is the sum of of ——.

Fourth. That said real estate is situate, lying and being in the county of Glenn, State of California.

Fifth. That the decree entered herein is by the laws of the United States and the laws of the State of California, a lien on said real estate to secure the payment of the said decree.

Sixth. That said real estate is unencumbered.

Seventh. That the lien on the said real estate is more than ample to secure the payment of said judgment.

WHEREFORE your petitioner prays that the court allow said appeal and direct the issuance of a citation as provided by law, and the above-named defendant desiring to supersede the execution of the decree, petitioner here tenders bond in such amount as the court may require for such purpose and prays that with the allowance of the appeal a supersedeas be issued.

W. T. BELIEU,
HUSTON, HUSTON and HUSTON,
Attorneys for Appellant and Defendant. [96]

The foregoing petition is this day granted and the appeal allowed and shall operate as a supersedeas upon the petitioner filing a bond in the sum of $125,-

000.00, with sufficient sureties to be conditioned as required by law.

HAROLD LOUDERBACK,
Judge.

Dated: October 6th, 1930.

[Endorsed]: Filed Oct. 6, 1930. [97]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the defendant, Peter Barceloux Company, a corporation, and files the following assignments of errors upon which it will rely upon its prosecution of the appeal in the above-entitled cause from the decree made by this Honorable Court on the 19th day of September, 1930:

First. That the said court had no jurisdiction to enter the judgment against the said defendant for the sum of $106,582.59 and such judgment is beyond the jurisdiction of the Court for the reason that the capital stock and other personal property transferred by the said H. J. Barceloux, bankrupt, to the said defendant, Peter Barceloux Company, a corporation, and described in said bill of complaint herein, except seventy-five (75) shares of the Pacific National Fire Insurance Company, nine (9) shares of the capital stock of the Bank of Orland and one hundred (100) shares of the Glenn County Garage Company, has, ever since the assignment and delivery thereof and now is in the possession of the said

defendant, Peter Barceloux Company, a corporation; that the stock of the Glenn County Bank was between the date of the said pledge and the date of the filing of the bill of complaint, transferred and exchanged for the stock of the Transamerica Company, which said stock was at [98] the time of the filing of this action and ever since has been in the possession of the said defendant, Peter Barceloux Company, a corporation.

Second. That this court of equity had no jurisdiction to render a money judgment against the said defendant, and the only relief within the jurisdiction of the said court of equity in this action was to annul and cancel the transfer, and adjudge and decree the return of the stocks to the plaintiff herein.

Third. That there is no evidence to sustain the decree of the court for the following reasons:

(a) There was no evidence showing that the said H. J. Barceloux was either bankrupt or contemplated bankruptcy, or that either of the transfers alleged in said bill of complaint was made by the said Barceloux when he was bankrupt or in contemplation of bankruptcy, or with the intent to hinder, delay or defraud any of his creditors.

b. That the said defendant, Peter Barceloux Company did not accept the transfer of said property described in said bill with the knowledge that the said H. J. Barceloux was a bankrupt or was contemplating bankruptcy, or that he had any intent to hinder, delay or defraud any of his creditors, or any fraudulent intent whatever.

(c) That a valuable consideration was received by the said bankrupt for said property.

(d) That said transfer did not include all of the assets of the said bankrupt.

(e) That said transfer was made more than four (4) months prior to the adjudication of bankruptcy to secure a *bona fide* and existing indebtedness from the said bankrupt to said corporation and was made in the usual course of business. [99]

(f) That there was no secrecy connected with said transaction; that George R. Freeman, administrator of the estate of Frank Freeman, deceased, the principal and only active creditor of the said H. J. Barceloux, a bankrupt, had full knowledge of the entire transaction, and with such full knowledge accepted and received as security for his indebtedness against said bankrupt a transfer of the said stock of the Peter Barceloux Company owned by said bankrupt subject to the pledge of the said Peter Barceloux Company; that near the same time the said bankrupt transferred and conveyed to said Freeman certain other properties selected by said Freeman from the assets of said bankrupt, to secure the payment of the said indebtedness due him.

(g) That said property was subsequently sold by the said defendant, Peter Barceloux Company, a corporation, under said pledge and in compliance with the laws of the State of California at public auction.

(h) That there is no evidence sustaining the decree of said Court.

Fourth. That the court had no jurisdiction to render said decree and said decree is beyond the jurisdiction of said court in that the bill of complaint herein alleges the value of said property transferred on the 27th day of April, 1926, to be the sum of Eighty Thousand Dollars ($80,000.00) and that transferred on June 29th, 1926, to be the sum of Two Thousand One Hundred Dollars ($2,-100.00) or a total value of Eighty-two Thousand One Hundred Dollars ($82,100.00) of all of the property transferred; that the bill of complaint herein prays judgment for the value of all of said shares of stock at the time of the said transfers; that the court herein entered a decree in favor of the said plaintiff for the sum of One Hundred Seven Thousand Eight [100] Hundred Fifty-four and 94/100 Dollars ($107,854.94); that said judgment exceeds the value alleged in said bill of complaint in the sum of Twenty-five Thousand Seven Hundred Fifty-four and 94/100 Dollars ($25,754.94).

Fifth. That the court had no jurisdiction to enter any decree in excess of the amount alleged in said bill of complaint as aforesaid.

Sixth. That the court by its decree awarded plaintiff the sum hereinbefore mentioned as the highest value of the property or stocks involved between the date of their transfer and the date of the decree.

Seventh. That the said court had no jurisdiction to render a decree for any value of said stock or the highest value of said stock, because said stocks were at the time of the filing of said decree,

and now are in the possession of the said defendant; that such relief is not justified nor supported by the allegations or the prayer of the bill of complaint herein.

Eighth. That the said sum fixed by said court as the highest value of the said property as aforesaid was not and is not based upon the value of the property transferred in the condition in which it was at the date of such transfer.

Ninth. That the value of said property transferred is not supported by the evidence and is contrary to law in that it is based upon the valuation of the physical assets of said corporation without taking into consideration the factors prescribed by law determining the market value of the capital stock of a corporation; that the said valuations as fixed by said court, disregarded and did not take into consideration the following factors fixing its value as shown by the evidence:

(a) That all of the assets of said corporation were [101] transferred to it by Peter Barceloux and Lumina Barceloux subject to a reservation and exception in such transfer in favor of the said Peter Barceloux and Lumina Barceloux reading as follows:

> "That said parties reserve and except from said conveyance all of the rents, issues and profits and the income from the said real and personal property as long as either of them may live."

That the said Lumina Barceloux was at the date of the said transfer and now is living.

(b) That the said corporation was what is commonly known as a family corporation, in that all of the stock was owned by the members of the family of said Peter Barceloux and Lumina Barceloux.

(c) That the said corporation for several years has not earned or declared any dividends.

(d) That said corporation for several years has not had any net earnings.

(e) That said corporation has been operating at a loss.

(f) That said capital stock represents a minority holding in said corporation.

Tenth. That the court had no jurisdiction to enter that part of said decree, that no part of the money collected by the complainant pursuant to the decree, was to be devoted in whole or in part to the payment of any claim or claims of the said defendant Peter Barceloux Company, now presented or may hereafter be presented or allowed in the matter of Henry Joseph Barceloux, a bankrupt, which latter proceeding is pending in this court, until all claims of other creditors of said bankrupt existing on the 16th day of August, 1926, together with all [102] reasonable allowances, commissions and costs and expenses of administration in said bankruptcy proceeding shall have been paid in full, for the following reasons:

(a) That each of the said transfers alleged in said bill of complaint as being fraudulent was made more than four (4) months prior to the adjudication of bankrupt.

(b) That neither the laws of the United States

nor of the State of California justify, support or authorize that portion of said decree, or any part thereof.

(c) That that portion of said decree is not within the issues made by the said pleadings herein, nor within the scope of the relief prayed for by the said plaintiff in the bill of complaint.

(d) That punitive relief is neither sought by the pleadings nor supported by any evidence.

(e) That the matter of determining whether or not the said Peter Barceloux Company should participate in the distribution of the said moneys if collected pursuant to this decree is a matter wholly within the jurisdiction of the bankruptcy court and is not within the jurisdiction of this court.

(f) That said transfer was made to secure the payment of a *bona fide* existing and undisputed indebtedness of the said bankrupt in favor of the said defendant, Peter Barceloux Company, a corporation.

Eleventh. That the court erred in overruling and denying the exceptions of the defendant, Peter Barceloux Company, a corporation, to the report of the Master in that there is no evidence justifying the said report.

Twelfth. That the value certified by the Master as the highest aggregate value of all of said properties and corporate stocks referred to in the interlocutory decree is not supported by the evidence and is not the highest aggregate value of said properties as defined by law and directed in said decree. [103]

Thirteenth. That the Master did not find, determine or ascertain the highest market value of said property referred to in said interlocutory decree in the condition in which it was at the time of the transfer as alleged in said bill in equity, but on the contrary found the highest market value of the shares of capital stock of certain corporations which were not owned or possessed by defendant corporation on August 16th, 1926, but were thereafter acquired; that said highest aggregate value was fixed by taking the highest value of each of the shares of said corporations between the date of the interlocutory decree and the date of the audit; that said Master did not determine the highest aggregate value or any value of the stocks referred to in said decree in the condition in which said stocks were at the time of the transfer; that each of the assets of said corporations were valued on separate dates and such values were used to determine the value of said certificates on a certain date.

Fourteenth. That the finding of said Master does not determine the value of the said stocks referred to in said interlocutory decree; that instead of following the directions of the interlocutory decree and finding the highest aggregate value of the capital stock of the Peter Barceloux Company referred to therein, the said Master placed the highest value on each asset of said corporation on different dates between the date of the transfer and the date of the audit, and took the total of said values as the valuation of the stock transferred and deducted therefrom the liabilities of said corporation as determined by the said Master, and took the balance

as the highest aggregate value of such stock; that said Master in valuing said stock disregarded the fact that the defendant corporation was a family corporation; that said capital stock was not earning any dividends; that said corporation was operating at a loss; that the capital stock was a minority holding; that said capital stock was subject to contract entered into between Lumina Barceloux and Peter Barceloux hereinbefore mentioned reserving all of the rents, [104] issues and profits and the income from the real and personal property owned by said corporation.

Fifteenth. That said Master did not find either the actual or market value of the property of the Peter Barceloux Company; that the finding of said Master is contrary to and unsupported by the evidence.

Sixteenth. That the evidence taken before the said Master was insufficient to support the finding of the value of the various properties of said corporation.

Seventeenth. That the court erred in overruling the following objections of the defendant to the testimony of the witness Graves:

(a) "Q. What is your opinion as to the market value of this property?

Mr. HUSTON.—We make the objection it is irrelevant, incompetent and immaterial. The question here is the value of the stock of the Peter Barceloux Company.

The MASTER.—The objection is overruled. We will have to have a valuation of all the assets before we can ascertain the value.

Mr. HUSTON.—We will take an exception."

(b) "Q. Has there been any change in the market value since August 16th, 1926, to date?

A. I don't think so.

Mr. HUSTON.—We make the objection that it is incompetent, we are only concerned with the value of the land at the date of the alleged fraud in the two bills filed in the District Court.

The MASTER.—Answer the question. The objection is overruled. [105]

Mr. HUSTON.—We note an exception."

(c) "Mr. HUSTON.—At this time we move to strike the testimony of this witness (Eibe) upon the following grounds:

First. The witness has not been shown to be qualified to testify to land values. Second, the fact that he is the County Assessor doesn't qualify him to give his opinion as to land values, and third, the proper hypothetical question was not put to the witness for the purpose of ascertaining the land values and we will ask for a ruling upon the motion.

The MASTER.—It is overruled. The motion is denied.

Mr. HOUSTON.—Note our exception to the ruling. We make further motion to strike from the evidence the assessor's list under the authority of Yolo Water and Power Company vs. Edwards, 50 California Appellate, that the assessment-roll was not evidence of land values and also 33 Cal. App.

Mr. WULFF.—We will consent to that being stricken out for the purpose of showing market value.

Mr. BELIEU.—That's what you were testifying about, wasn't it?

Mr. WULFF.—So far as proving market values, the assessor's assessed valuation was not proof of market value and so far as being introduced as proving market value we will consent to the motion.

Mr. HOUSTON.—Well, does that leave it in or out of the record?

Mr. WULFF.—It remains in for the reason we are taking testimony in a Special Master's proceeding in equity and the Master has a great latitude in taking evidence. If the Master for any reason wants the assessor's valuation of the property he has it, but we didn't introduce it in the first instance as proof of market value, and if you want to strike it out on that ground we will consent to it.

Mr. HOUSTON. — After the motion is granted will the record [106] be in or out? I still don't know if they will be in this record or out of it.

Mr. WULFF.—They are out of the record so far as proof of market value is concerned.

The MASTER.—If it is the wish of the attorneys to leave it out as far as market values are concerned, all right.

Mr. HOUSTON.—The assessment-roll now having been stricken out, we move to strike out the testimony of this witness as to value for the reason it is gained purely and simply upon the knowledge gained from the assessment-roll.

Mr. WULFF.—This witness has qualified himself as an expert as to land values and knowledge of market values and his testimony as to market value is competent evidence.

The MASTER.—That objection is overruled.

Mr. HOUSTON.—We take an exception."

(d) "Q. You hand me here an unsigned copy of a contract dated December 9th, 1927, by and between G. A. Barceloux, W. E. Johnson and such other stockholders of the Bank of Orland as sign the agreement, parties of the first part and the French American Corporation, a corporation organized and existing under and by virtue of the laws of the State of California, party of the second part. This contract provides for the sale of the stock of the Bank of Orland at a price of One Hundred Dollars per share, payable on delivery of the stock, 'and such further consideration as provided herein.' Was the sale made at one hundred dollars per share? A. Yes.

Mr. HUSTON.—That isn't the proper method of proving the value of any property, and particularly the value of the shares of stock of the Peter Barceloux Company. [107]

Mr. WULFF.—In this matter, one of the matters referred to was the value of nine shares of the Bank of Orland stock in the Peter Barceloux Company case, if my recollection is correct.

Mr. HUSTON.—I*n* this testimony directed to the value of certain shares of stock owned by the Peter Barceloux Company?

Mr. WULFF.—This evidence is for the purpose of tracing through assets, following assets.

Mr. HUSTON.—It is immaterial.

The MASTER.—Mr. Houston, we have to get the value of all the assets of the Peter Barceloux Company before we can ascertain the value of the stock,

and anything that is going to be of assistance to the auditor in determining the values will be introduced in evidence. The objection is overruled.

Mr. HUSTON.—Exception. I wish you to understand our position. Our position in this matter is this: That the proper method of fixing the value of the Peter Barceloux Company shares, which is the subject matter of this action, is by calling for the testimony of qualified witnesses to fix the market value of those shares, taking into consideration not only the assets of the corporation, but all other facts and circumstances surrounding the condition of the corporation, and particularly all contracts going directly to the value of the shares, rather than by attempting to fix them by a piecemeal appraisal of the assets. Our purpose is to save these points so as to be reviewed later, if necessary. I make that explanation so you may understand why we are making these objections.

The MASTER.—It will be understood that the objection should stand to this line of testimony. I suppose it can be done in that manner, and be overruled and the exceptions noted without interruptions. Yesterday objections were made and exceptions taken and we allowed the testimony because we felt, as an auditor, we need this information." [108]

Eighteenth. — That the valuation of the said stocks transferred as fixed by the said Master and by the court is contrary to law and unsupported by the evidence, in that said valuation includes dividends declared on the said capital stock after the

date of said transfer, and the valuation as fixed by the court and the said Master includes said dividends as capital.

Nineteenth.—The court erred in overruling the following objections of the defendant:

(a) "Mr. FREEMAN.—I wish to offer at this time the petition of the bankrupt and the schedule filed here on the 24th day of February, 1927. It is admitted in the pleadings the adjudication was made on the 25th I believe.

Mr. NAPTON.—We object to it on the part of the Peter Barceloux Company, defendant, for the reason that the matters contained therein would not be of any weight against the defendant corporation.

The COURT.—It will be admitted over the objection and if not entitled to any consideration the Court will give it none.

Mr. NAPTON.—Exception."

(b) Mr. FREEMAN.—I wish now to offer all the claims that were filed in this proceeding with the suggestion we will make a tabulation showing the matter contained in the claims.

Mr. NAPTON.—We object to that for the reason it would not be binding upon the Peter Barceloux Company.

The COURT.—A like ruling.

Mr. NAPTON.—Exception."

(c) "Mr. FREEMAN.—Q. Did you owe at that time A. R. Hancock the sum of $1815 for something that accrued on June 5, 1926? [109]

A. I think so.

Mr. NAPTON.—If this is introduced for the purpose of showing insolvency at the time of the judgment mentioned in the complaint, we object to it on that theory on the ground that insolvency would not relate back.

The COURT.—Objection will be overruled.

Mr. NAPTON.—Exception.

Mr. FREEMAN.—We offer in evidence the certified record of the findings in the case of Freeman against Donohoe and Barceloux.

Mr. NAPTON.—For what purpose?

Mr. FREEMAN.—To show the Court what the findings were as to the accrual of the indebtedness of Frank Freeman against Barceloux.

Mr. BELIEU.—Well, you have got the judgment in evidence.

Mr. FREEMAN.—I offer this, if the Court please.

Mr. BELIEU.—Now, that has no purpose, your Honor, and we object to it. They have already introduced the judgment in this action.

Mr. NAPTON.—It is set forth in the findings.

The COURT.—What is the date of your judgment?

Mr. FREEMAN.—The date of the judgment is July 19, 1921.

The COURT.—What is the date of your judgment?

Mr. FREEMAN.—The date of the judgment is July 19, 1921.

The COURT.—That serves your purpose, I imagine.

Mr. FREEMAN. — The purpose, if the Court please, of introducing these records, including the findings in the case, is to show the accrual of the cause of action against Barceloux to be as early as 1910—June 1, 1910.

Mr. NAPTON.—It was reduced to a judgment. [110]

The COURT.—It will be admitted if not material, the court will give it to consideration.

Mr. NAPTON.—Exception."

(d) "The stock you had in the Peter Barceloux Company, you carried on—you valued at $80,000, didn't you?

A. No, there was a value—I don't know—it is in the book. It makes no particle of difference about what the stock is worth.

Q. Let us not argue that question. Didn't you, as a matter of fact, place a valuation of your interest in the Peter Barceloux Company at $80,000?

A. When?

Q. On the very date that it was sold by the Peter Barceloux Company? A. No.

Q. I show you your journal, Mr. Barceloux, page 46, under the subhead of 'journal,' the first item.

Will you explain what that means?

Mr. NAPTON. — We object to this since that would be just a matter of opinion and would not be the best evidence in this case. It would simply be hearsay and we will object to it for that reason.

The COURT.—You may answer.

Mr. NAPTON.—And, furthermore, it would not be finding on the Peter Barceloux Company.

The COURT.—If it is not competent, the court will ignore it.

Mr. NAPTON.—Exception." [111]

(e) "Then I show you on page 45 of the ledger an item also of August 24, 1926,—does that have to do with the stock that was taken over by Mrs. Gelinas? A. Sure.

Q. And at what valuation did you carry those stocks on your books?

A. The only way to explain that would be this, Mr. Freeman, a part of this—it was no doubt carried at the valuation as of years gone by when it was entered in the books. Then there was an assessment levied against some of this stock, in fact, I think there was an indirect one on both of them, but there was a direct assessment on one of them. No doubt when that assessment was made that was charged against the item in the book. It added to the total value of that stock as far as the book was concerned, but it did not—that would not signify that the stock was worth at that time what this account shows here because of those assessments that were levied against that stock which adds the total cost on the debit side of the ledger, and when it was sold to balance the account there was only one way to do it and that was to credit the difference between what was received and what was due on the stock.

Q. All right. Now, after that at what valuation did you carry your stock on your books; according to the books you have there?

A. According to the books as they show here?

Q. Yes.

A. You would have to get the ledger to show that.

Q. Doesn't that journal entry show it?

A. No; this would not signify what I carried it at in the ledger.

Q. According to this entry, I have now shown you, Mr. Barceloux, you show a valuation of $25,772.50 on account of the 35 shares of stock in the United Bank & Trust Company and 158 [112] shares of Glenn County Bank, which you sold for $13,800, making a net loss of $9,972. Isn't that what that entry shows?

A. No, it does not. It does not show the valuation of your stock at all. It shows a book account as of the stock after the expenses incurred in handling that stock.

Mr. FREEMAN.—I offer the book in evidence.

Mr. NAPTON.—We object to it for the reason it is an arbitrary value, hearsay, and for the further reason it would not be binding on the defendant, Peter Barceloux Company, and is not the best evidence of the value of the stock. There has been no evidence introduced here as to what the stock would sell for in the open market, and until they show that there is a sale for the stocks in the open market—

Mr. FREEMAN.—We expect to show that, but I think it is entirely competent under the allegations of this complaint, and the fact of conspiracy between the defendant and the bankrupt to get all his assets into the hands of his family.

The COURT.—It may be admitted, and if not

competent, the court will not consider it. Overruled. (Document marked Exhibit 15.)

Mr. NAPTON.—Exception."

(f) "Mr. FREEMAN.—Q. When that sale was made in July or in August, 1926, of the Peter Barceloux Company stock you had hypothecated, did you know that sale was going to be made?

A. Yes.

Q. Who told you that?

A. I had a written notice.

Q. Who gave you that?

A. I think it came from Mr. Belieu.

Q. Did you attempt to find any bidder to go to that sale? A. Why, no.

Mr. NAPTON.—We object to that. It would be immaterial and not incumbent upon him to do so. [113]

The COURT.—Overruled.

Mr. NAPTON.—Exception."

Twentieth.—The court erred in overruling the objection of the defendant to the testimony of the witness George R. Freeman as follows:

(a) "Q. Are you acquainted with an Hindu by the name of Chanan Singh? A. Yes.

Q. How long have you known him?

A. Since about 1918 or 1919.

Q. Do you know anything of his financial condition? A. Well, generally. I would say, yes.

Q. What is his reputation as to financial status during the year 1920?

A. Well, in regard to 1920, that is the year of

the rice failure, and Chanan Singh, along with the rest of them, went broke.

Q. Would you say the judgment held by the bankrupt against Chanan Singh in the amount of $1,577.91 is collectable? A. No.

Mr. BELIEU.—We object to that on the ground that the witness has not qualified himself to state.

The COURT.—Well, we will let it stay in the record; if it is not entitled to any weight the court will give it none.

Mr. BELIEU.—Exception."

(b) "Mr. WULFF.—Q. Did you have a talk with Cora Gelinas in July, 1926, in reference to your assignment?

A. Yes.

Q. What is the nature of that conversation?

A. I went over to see her in reference to the assignment [114] that Henry had given me and told her that it had no purpose other than getting protection for the estate in having that assignment made and have them acknowledge notice of the fact that I had it.

Q. Did you ever receive any notice of any sale under Peter Barceloux' Company's pledge agreement? A. I did not.

Mr. NAPTON.—Object to that for the reason that he did not have to have one under the statute of California.

The COURT.—Overruled. If not entitled to weight the court will give it none.

Mr. NAPTON.—Exception.

Twenty-first.—The court erred in overruling the

objections of the defendant in connection with the testimony of the witness Gelinas as follows:

(a) "Q. At the time you made this sale did you give any publicity to that sale, or just content yourself or the corporation with giving the legal notice?

A. I gave the legal notice and pasted one on the post right in front of your office and one in front of the postoffice and one in front of the courthouse.

Q. Now, Mr. Barceloux, the question was, did you give any publicity to it other than the posting of notices?

A. I don't know what you mean.

Q. Did you put it in the paper that you were going to sell the stock? A. I think so.

Mr. NAPTON.—We object for the reason he did not have to.

The COURT.—He has answered it.

Mr. FREEMAN.—Q. Did you tell anybody the sale was going to be made. [115]

Mr. NAPTON.—Same objection.

The COURT.—He may answer it; overruled.

The WITNESS.—Yes, I told somebody; I cannot say I did not tell nobody.

Q. Now, at the time you made the sale, Mr. Barceloux, you were the president of the Bank of Orland? A. Yes.

Q. What was the value, the book value, Mr. Barceloux, of the nine shares of Bank of Orland stock that you had?

Mr. NAPTON.—We object to that as not being the best proof, your Honor.

The COURT.—If the witness knows, overruled.

The WITNESS.—I cannot tell exactly what the book value was.

Mr. NAPTON.—Exception."

Twenty-second.—The court erred in admitting the testimony of bankrupt and witnesses taken at the time of the hearing before the Referee in Bankruptcy:

(a) "Mr. FREEMAN.—Were there various hearings, Mr. Belcher, before you?

A. Yes.

Q. Were there records made of those hearings?

A. Yes.

Q. A typewritten transcript? A. Yes.

Q. Have you them with you? A. Yes.

Mr. FREEMAN.—For the purpose of identification at this time we offer that record unless it will be stipulated that that was the record taken and that the contents, the testimony given by the various witnesses at that time—

Mr. BELIEU.—Well, we could not stipulate to that, if the court please, because of the fact there were disconnected meetings. The testimony was brief; did not pretend to cover [116] all the circumstances connected with the transaction, nor did it pretend to give the full details of the transactions. We merely appeared there in answer to subpoenaes at the instance of the creditors and only testified as to questions that were asked by them and it did not pretend in any way, manner or reason to give—

The COURT.—(Interrupting.) What is the object of this?

Mr. FREEMAN.—I think, if the Court please, that that testimony is admissible. We have Mr. Belcher and his court reporter here to identify it.

The COURT.—The object is what?

Mr. FREEMAN.—For impeachment purposes mainly,—admissions by various witnesses. We are in this position, if the Court please, the plaintiff in this case has to make his proof from the bankrupt and we would like to have that record here identified so it could be used.

The COURT.—Oh, very well, identify it. I understand the purpose is simply to identify it now?

Mr. FREEMAN.—Yes.

The COURT.—Objection overruled.

Mr. NAPTON.—Exception.

(Document marked Exhibit 2 for identification.)

Mr. FREEMAN.—Q. Will you have them marked, Mr. Reporter?

Mr. NAPTON.—We except to the ruling."

Twenty-third.—The court erred in admitting the testimony of John H. Graves respecting the land of the Peter Barceloux Company and which testimony is as follows:

(a) "Q. Are you familiar with the properties belonging to the Peter Barceloux Company?

A. Yes.

Q. The real properties? A. Yes. [117]

Q. You have had occasion, have you, Mr. Graves, in the year past to appraise those properties?

A. Yes.

Q. Now, are you familiar with what is known as the home ranch? A. Yes.

Q. Belonging to and consisting of some 2,000 acres? A. About 2100 acres.

Q. Twenty-one hundred acres. Did you know that property on the 27th day of April, 1926?

A. Yes.

Q. And, as a title man, and also as an inheritance tax appraiser did you have occasion to keep track of the sales and transfers of the real property of the quality of the land described as the home place?

A. Yes, on several occasions.

Q. Have you an opinion, Mr. Graves, as to the value, property market values, of what is described as the Home Ranch. A. Yes.

Mr. BELIEU.—Objected to as immaterial and upon the further ground the stock is the subject matter of this inquiry.

The COURT.—Overruled.

Mr. BELIEU.—Exception."

Twenty-fourth.—The court erred in admitting the evidence of Frederick K. Hatch respecting the value of Glenn County Bank stock:

(a) "Mr. FREEMAN.—Q. Your name is W. K. Hatch?

A. Yes.

Q. What is your business or occupation?

A. Banker.

Q. With what bank?

A. Bank of Italy. [118]

Q. Were you with the Glenn County Bank in 1926? A. I was.

Q. Did the Glenn County Bank subsequently sell out to the Bank of Italy? A. They did.

Q. Prior to that time how long had you been with the Glenn County Bank? A. Since 1912.

Q. Was the stock of the Glenn County Bank a listed stock, Mr. Hatch? A. No, it was not.

Q. Was not listed. Have you in your possession now a statement of the bank made in June, 1926, and December, 1926?

A. I have not it with me.

Q. You did not bring one with you? A. No.

Q. Do you know, Mr. Hatch, independently of having the statement with you what the book value of Glenn County Stock was in the month of July and August, 1926, the Glenn County Bank Stock, I mean.

Mr. NAPTON.—We object to that as not the best evidence of the value; the market value would be the best value.

The COURT.—It would be, but proceed, as the court has suggested various ways. It might be one element, an element of market value. Overruled.

Mr. NAPTON.—Exception."

W. T. BELIEU,
HUSTON, HUSTON and HUSTON,
Attorneys for Appellant and Defendant.

[Endorsed]: Filed Oct. 6, 1930. [119]

[Title of Court and Cause.]

AGREED STATEMENT OF EVIDENCE UNDER EQUITY RULE No. 75, TAKEN BEFORE MASTER AND AUDITOR.

BE IT REMEMBERED that this cause was submitted to H. M. Barton, Esq., Master and Auditor, and as such came on regularly for hearing before said Master and Auditor on the 7th day of November, 1929, upon the order thertofore made by the Judge of the above-entitled court.

COMPLAINANT'S CASE.

The complainant put in evidence the following exhibits:

Exhibit 1 and 1a—Books of Account of Peter Barceloux.

Exhibit 2—Minute-book of P. D. Company, Sacramento.

Exhibit 3—Agreement between Peter Barceloux and Lumina Barceloux, his wife, and Peter Barceloux Company.

Exhibit 4—Agreement between W. K. Hatch, H. J. Barceloux D. F. Geis and other stockholders of Glenn County Bank and Bancitaly Corporation.

Exhibit 5—Workout agreement respecting the sale of Glenn County Bank to Bank of Italy.

Exhibit 5a—Memorandum of Agreement between W. K. Hatch D. F. Geis and H. J. Barceloux. [120]

Exhibit 5b—Memorandum of Agreement between W. K. Hatch, D. F. Geis and H. J. Barceloux.

Exhibit 6—Statement of Peter Barceloux Company, Savings Account with Glenn County Branch, Bank of Italy.

Exhibit 7—The account of Peter Barceloux Company with Glenn County Branch, Bank of Italy.

Exhibit 8—Statement of resources of Peter Barceloux Company.

Exhibit 9—Statement of Bills Receivable Peter Barceloux Company.

Exhibit 10—Agreement between J. A. Barceloux and French American Corporation.

Exhibit 10a—Articles of Incorporation of Peter Barceloux Company.

Exhibit 11—Account of Peter Barceloux Company with Bank of Orland.

Exhibit 12—Account of Peter Barceloux Company with Bank of Orland Savings Department.

Exhibit 13—Answer of George A. Barceloux, Cora P. Gelinas, H. J. Barceloux et al. in the action of E. J. Barceloux and Vernon Barceloux against the parties first named.

DEFENDANT'S CASE.

The defendant put in evidence the following exhibits:

A. Sacramento Records.

B. Assessment List of lands of Peter Barceloux Company.

Ba. Affidavit of Helen Hallowell.

(Testimony of W. K. Hatch.)

C. Stock quotations Transamerica Corporation.

D. Bank of Italy Corporation account with Peter Barceloux Company.

The above and foregoing is all the documentary evidence introduced at the hearing before the Auditor and Master herein and all proceedings had at the hearing thereof and the following is all the evidence introduced by the complainant and defendant. [121]

TESTIMONY OF W. K. HATCH, FOR COMPLAINANT.

(Examined by GEORGE R. FREEMAN, One of the Attorneys for Complainant.)

W. K. HATCH, after being duly sworn, testified as follows:

My name is W. K. Hatch and I reside in Willows and I am manager of the Glenn County Branch of the Bank of Italy and I have been such manager since 1927. I have been connected with the Glenn County Bank since 1912 and from 1925 on was cashier, and the Glenn County Bank was sold to the Bancitaly Corporation on August 22, 1926.

There was a contract between the Bancitaly Corporation and the trustees of the Glenn County Bank, which was signed by the majority of the stockholders of the Glenn County Bank, and I have the contract with me upon which I have pasted a list of the stockholders, which list is not the original list of stockholders, but the stockholders on the list pasted on the cover by me subsequently transferred

(Testimony of W. K. Hatch.)

their stock and this is the only contract we have affecting the sale of the Glenn County Bank to the Bancitaly Corporation.

At the time of this transfer H. J. Barceloux owned 100 shares of stock of the Glenn County Bank, Cora Gelinas, 232 shares and Peter Barceloux Company, 107. I have not with me at this time the stock certificate book or stock ledger of the Glenn County Bank, but I suppose I could produce them.

Under the terms of the contract Bancitaly Corporation agreed to pay $70.00 a share and there were $55.00 a share reserved by the second party as a guarantee for the payment of both principal and interest of the notes listed in Exhibit "A" and that certain parts of the real estate will sell for the value at which they are now carried on in the books of the Glenn County Bank. Two of the properties in Schedule A have been sold. The piece up here on the highway and this [122] parcel of 40 acres and the 40 acres was sold for $4,500.00 gross and I think the other $1,750.00.

The lot described as the corner lot on North Tehama Street of Cartenburgh extension sold for either $1,350.00 or $1,550.00 or $1,750.00 and were sold through the Land Department below, and the sales passed through our bank, and none of the other real property described in this schedule have been sold.

I have a file indicating any sales or promissory notes in Schedule A or those collected or paid and the records show parts of payments and interest and settlement and we haven't any record in our

(Testimony of W. K. Hatch.)

office on land taxes and income, and we have a record of the notes collected but none on real estate.

Under the terms of the contract any time after two years from date the second party shall have the right to pay the consideration reserved or any part thereof by the assignment of an equivalent amount of notes, principal and interest listed in Exhibit "A" or other assets listed in Exhibit "A" and interest calculated at the rate of six per cent. An extension of time has been agreed upon by the parties to this contract and I am still attempting to work out the assets, and it is just extended by a letter and has been extended two years. I have the stock ledger of the Glenn County Bank and on the 24th day of August, 1926, H. J. Barceloux owned Certificate No. 110 for 50 shares, Certificate No. 111 for 45 shares, and Certificate 112 for 5 shares and that is all the stock he owned.

On August 16, 1926, H. J. Barceloux owned Certificate No. 6, 20 shares, Certificates Nos. 7, 8, 9, 10 and 11 for 20 shares each and Certificate No. 12 for 30 shares and Certificate No. 13 for 8 shares of the Glenn County Bank.

The stock ledger of the Glenn County Bank of which I am the custodian shows that Certificates numbered 6, 7, 8, 9, 10, 11, [123] 12 and 13 were issued to Cora P. Gelinas on August 20, 1926.

The record shows that new certificates in the name of Mrs. Gelinas, namely, 149, 150 and 151 were issued for Certificates Nos. 6, 7, 8, 9, 10, 11, 12 and 13, and the former were transferred on November

(Testimony of W. K. Hatch.)

9, 1926, by Cora Gelinas to the Bancitaly Corporation.

H. J. Barceloux's certificates 110 for 50 shares, 111 for 45 shares and Certificate No. 112 for 5 shares were transferred to the Bancitaly Corporation on November 9, 1926, and the stock certificate book does not show who transferred them and merely shows the transfer of his stock, that is that 100 shares of stock to the Bancitaly Corporation.

Our records show that on August 16, 1926, the Peter Barceloux Company owned 107 shares of the Glenn County Bank stock and the Certificates numbers are 17 for 60 shares, 114 for 20 shares and 131 for 27 shares and the books show that these were disposed on November 9 to the Bancitaly Corporation.

Under the terms of the contract, Exhibit 4, the Peter Barceloux Company took $70.00 cash I think for all of its 107 shares. The Bancitaly Corporation has not advanced to the stockholders of the Glenn County Bank on account of the $55.00 workout any money; no settlement has been made with them.

I have with me the books of the Glenn County Bank showing savings and commercial accounts with reference to the Peter Barceloux Company and I have them from August 16, 1926, to the dates that the bank was succeeded by the Bank of America and the Bank of Italy. I have the records from the books showing the condition of the savings or commercial account of the Peter Barceloux Company from the time the Bancitaly succeeded the

(Testimony of W. K. Hatch.)

Glenn County Bank up to the present time and I have not any other property under my possession or control belonging to the Peter Barceloux Company. [124]

(Said records were introduced in evidence as Complainant's Exhibits 6 and 7.)

Cross-examination.

(By GEORGE FREEMAN.)

Under the contract to the Bancitaly Corporation two parcels of land only have been sold for the gross return of $4,500.00 on one parcel and $1,500.00 or $1,750.00 on the other and there is chargeable against the land under the contract interest, taxes, water charges, insurance and other expenditures and these items were a loss from what we carried it at on our books. A real estate brokerage's commission was paid which was chargeable against the fund.

On Schedule A attached to this contract is a list of commercial and savings. The bank had to take over the land for commercial loans and that was security charged against the commercial department and Lot 515 of the Sacramento Valley Irrigation Subdivision is one of the sales and carried on in this exhibit for $4,800.00 and under the contract the stockholders of the Glenn County Bank guaranteed the Bancitaly Corporation $4,800.00 and all carrying charges and on the exhibit here every collection is marked what it is and there have been settlements and compromises. The stockholders will not be entitled to the amount of collections as shown

(Testimony of W. K. Hatch.)

on this record and the whole thing will be settled finally and we will get another year's extension and we have too much money tied up in land, in farming land and some of it in the irrigation district and some of those lands are now being operated by the California Lands. The California Lands is a subsidiary concern of the bank here. As a general proposition it necessitates frequently the expenditure of sums of money in order to make property available. Two sales were made in 1928, I think. [125]

TESTIMONY OF D. M. RAWHAUSER, FOR COMPLAINANT.

D. M. RAWHAUSER, Deputy County Clerk and Clerk of the Superior Court of Glenn County, after being duly sworn, testified as follows:

Direct Examination.

(By GEORGE FREEMAN.)

I have with me all the papers in the suit entitled E. J. Barceloux et al., and G. A. Barceloux et al., in cause No. 4506 which papers are marked Plaintiff's Exhibit "A" for Identification.

No cross-examination.

TESTIMONY OF ELMER BARCELOUX, FOR COMPLAINANT.

ELMER BARCELOUX after being duly sworn, testified as follows:

(By GEORGE FREEMAN.)

My name is Elmer Barceloux. I am a stockholder of the Peter Barceloux Company and I was one of the defendants in the action of E. J. Barceloux et al. vs. George Barceloux, et al. I have had papers similar to those statements that you show me and I would say they came from the Peter Berceloux Company—they were mailed to me and I imagine George is the one who mailed it and of course some of them Cora might have. Exhibit "D" 17a and 17b I don't remember of getting one like it, but Plaintiff's Exhibit 15 looks like I had received a statement like that. (Said statement showing assets and liabilities of Peter Barceloux Company as of December 31st, 1927, was introduced in evidence as Complainant's Exhibit No. 7.)

Plaintiff's Exhibit 16 which you show me purporting to be a statement of bills receivable, dated September 8, 1927, a statement of stock carried on the books as of same date and trial balances, I couldn't say if that is the one I received or one just like it.

(Said statement was introduced in evidence and marked Complainant's Exhibit No. 8.) [126]

(Testimony of Elmer Barceloux.)

Cross-examination.

(By Mr. HUSTON.)

Referring to Exhibit No. 8, I couldn't say I received more than one just like that and that is like one I received.

It was customary for me to receive financial statements from the Peter Barceloux Company and I I don't think I have ever given them away to anybody. I don't think the statement you show me is the one I received, but I might have received one just like it. In the statements I received from the Peter Barceloux Company the matters were all typed, and the reason that I can recall that this statement is similar to the one I received is I read them over and I recall distinctly receiving these two statements here and I received them through the mail.

TESTIMONY OF JOHN H. GRAVES, FOR COMPLAINANT.

JOHN H. GRAVES after being duly sworn, testified as follows:

(By HORACE B. WULFF.)

My name is John H. Graves. I reside in the town of Willows, county of Glenn. I have lived 43 years in the county and lived in Willows for 37 years and prior to 1893 was engaged in farming and stock-raising and following 1893 I was county recorder for 14 years, the would be from 1893 to 1907 and subsequent to 1907 I went in to the title

(Testimony of John H. Graves.)

business, i. e., abstracts certificates and title insurance and I am still engaged in that business and haven't any competitors and I am also inheritance tax appraiser for the state controller and have been such appraiser for more than 20 years. When I was county recorder I discussed the sales of real estate with parties who delivered deeds for recordation and as such recorder I was familiar with the sales occurring during the period I occupied that office and in my capacity as inheritance tax appraiser I have had occasion to appraise real estate in the city of Willows and to appraise farms and land in the vicinity of the Peter Barceloux Company land and I know where the lands of the Peter Barceloux Company are located. [127]

I have appraised in my capacity as tax appraiser more than 100 ranches in different parts of the county, in the last 20 years and I have had occasion to make appraisals for bank and private parties respecting private property. I have had several for the Bank of Willows, W. J. Tobin of the Hibernian Bank and one or two for the first National Bank of Oakland and some in the south.

I am president of the Abstract Company and as such president am familiar with the market value of real estate and of sales thereof in this county. I am familiar with the market value of land from August, 1926, to date and I know the home ranch of the Peter Barceloux Company and have known it for about 37 years and had occasion to view this property for the purpose of appraisement for the Inheritance Tax Department and appraised it for

(Testimony of John H. Graves.)

the State Controller after the death of Peter Barceloux. I am familiar with the soil and its type and character and I suppose it is called a clay loam and is about 10 or 15 feet in depth and I am familiar with the type of crops that may be produced and grown on that property and part of it will grow rice and at the present time some of it is good for wheat, barley and alfalfa and I suppose you could raise on it almonds, figs, peaches, grapes and apricots. There is a good county road on the west of it and on the north and it is two miles from Main Street Highway and is about 4 miles from the town of Willows to the southwest and all this land could be irrigated with wells and the eastern portion is in the irrigation district, that is 500 or 1,000 acres and is irrigated from the big canal of the Glenn Colusa Irrigation District. 500 to 1,000 acres of this land lies within the reclamation district and the improvements on the property consist of old barn buildings, a house and other buildings and the property is fenced and my opinion is that on August 16, 1926, that is the east 1,000 acres is worth $50.00 an acre and the west 1200 [128] acres at $100.00 an acre and there has not been any change in market value since August 16, 1926, to date.

I am familiar with the Longmire ranch containing approximately 1240 acres and have known that property 37 years and have been on this property and had occasion to appraise it for the Inheritance Tax Department. I am familiar with the type of

(Testimony of John H. Graves.)

soil on the Longmire ranch and it is similar to the other property, but a portion of it is not quite so good and the soil is about the same depth and grain, wheat and barley could be raised on these premises but none of it is under irrigation but if irrigated would be good for rice and with irrigation this farm could raise the same type of crops as the Home Ranch would. This property has a paved highway two miles long on the south of it and county roads on the west, north and east and is about one mile from the town of Willows, but the land is not now subject to irrigation, but could be irrigated from wells and no part of this land lies within any reclamation district or irrigation district and on this property are houses, barns and outbuildings and the property is fenced and I have an opinion of the market value of the property on August 6, 1926, which is $80.00 per acre, and the market value of the property has not changed from August 16, 1926, to date.

I am familiar with the Blakely land, lots 25, 30, 31, 40 and 41 of the Cartenburg tract, which land is northeast of Willows about a mile therefrom and I have known the Blakely land for 37 years and I viewed this property for the purpose of appraisement under the same conditions as I testified to as to the other properties. The soil of this property is not as good as the others. It is a heavier soil and the property is low and subject to the overflow from Willows and Walker Creek and the depth of the soil is 5, 10, 15 feet and it would raise barley

(Testimony of John H. Graves.)

and wheat but not in abundance. They have never [129] grown very much on it and it is not well drained. This property is about half mile from the highway and there is a neighborhood road running of it and there are not any buildings on the property and I have an opinion of the market value and it is $50.00 per acre. The whole Cartenburg tract contains 320 acres but I don't know about these lots they are 10 and 20 acre-tracts and five lots would be about 40 acres.

I am familiar with the Dunlap land and know where it is located. It is in the Hochheimer Tract and about three miles north of Willows and the highway runs along east of the tract. I am familiar with the soil, it is good clay loam soil and is good farming land and been farmed for years to wheat and barley and is subject to growing other crops. My opinion is the Dunlap Tract as to its market value is $75.00 an acre. It was stipulated between the attorneys that there was 10 acres in Dunlap tract. I am familiar with the lots and the building known as the Barceloux Building in the town of Willows and the description of the Barceloux lots is the west 40 feet of Lots 28, 29, 30, 31 and 32 in Block 16, town of Willows. The building is located on the front 40 on Sycamore Street and runs south 125 feet and the building is a two-story brick and concrete. There are two stores and a printing-shop on the first floor and I think there are four groups of offices on the other, one of which is not occupied. It is my opinion that the

(Testimony of John H. Graves.)

market value of the Barceloux building and lot on August 16, 1926, was $30,000.00, and the market value of the Barceloux buildings and lot on August 16, 1926, was $30,000.00 and that value has not changed since August 16, 1926. I am familiar with the property known as the home residence which property is Lots 17 and 18 and the south 5 feet of Lot 19 Block 5 and the improvements on this property consists of a house, the residence and a garage and my opinion is that the market [130] value on August 16, 1926, was about $5,000.00 and the value has not changed since August 16, 1926. I am familiar with what is known as the Florenzo house. It is in Block 16 or perhaps Lot 23 or 25. I don't know exactly from memory the number of the lot—23, 24, 25, and 26 and the garage is included, and the Florenzo property and the garage are situated on the lot just named and there is a small frame building, an old building, occupied by some colored people. I would say that the market value of this property of August 16, 1926, was $1500.00 and the market value of that property has not changed since. The garage is forty or fifty feet facing on Butte Street and perhaps 100 feet in length with a cement floor and it is a good garage building of wood frame and corrugated iron and my opinion as to the market value of the garage property as of August 16, 1926, was $6,000.00 and I am testifying as to the values of these properties including the land and improvements combined. The value of the garage property has not varied since August

(Testimony of John H. Graves.)

16, 1926. I am familiar with the property described as beginning on the West line of Shasta Street 475 feet north of French Street, thence north seventy-five feet; thence West 160 feet; thence south 75 feet and East 160 feet to the place of beginning being a portion of block 57 of North Willows.

I am familiar with the subdivision known as the North Willows subdivision and as to the lots in that subdivision are described by metes and bounds and it is residential property and poor property at that for residential purposes and there are not any improvements on it and I would say the market value as of August 16, 1926, is $100.00 and this value has not changed since August 16, 1926.

I am familiar with the property of Antonio J. Lewis containing 60 acres more or less and it is situated southwest of the [131] town of Orland about 3 miles therefrom and it is about 2 miles from the main highway west, and the character of the soil on this 60 acres is a gravel soil similar to that of the Orland country. This property has been used for the last 5 years for alfalfa and trees and the soil is sediment and gravel and the same is the type of soil of all that Orland country and alfalfa, fruit, grapes, oranges and olives could be raised and there are just ordinary farm buildings on the property and the market value as of August, 16, 1926, was $8,000.00 and it hasn't changed since that time.

I am familiar with the Fortini property described as Lots 43 and 47, Loamridge Tract containing 40

(Testimony of John H. Graves.)

acres which is located southeast of Orland about 3 miles and there is a good road along the north of it and about 4 miles east of the main highway and on that property is one of the nicest orange orchards in the Orland country, 10, 15 or 20 acres full bearing oranges and the buildings are just ordinary farm buildings and the improvements don't amount to much and my opinion is that its market value as of August 16, 1926, was $25,000.00 and that value has not changed since and if anything it has increased.

I am familiar with the lot in the Cartenburg tract in which Peter Barceloux Company claims an interest and I think there is 10 acres in each lot and it is a 320-acre subdivision and most of them are 10-acre lots and I am familiar with that portion of the Cartenburg tract which Peter Barceloux Company claims a one-third interest and I know the nature of the land and soil conditions and there are no improvements on it and my opinion is its market value on August 16, 1926, was $50.00 an acre and the market value has not changed since then. [132]

Cross-examination.

(By Mr. BELIEU.)

There is a difference in the soil type on the so-called home place between the extreme east and the extreme west and I mean from the canal to the highway and I have never been over the area east of the canal belonging to the Peter Barceloux Company to make an examination of the soil type but I have observed a crop on that particular area east

(Testimony of John H. Graves.)

of the canal the last two or three years—a crop of rice and so far as I know that is the only purpose to which it has ever been devoted and I never saw a crop of wheat or barley upon the 320 acres east of the canal and that part in the extreme east has the reputation of being an alkali field that is the extreme east, but I gave my opinion as to the east 1,000 acres. There is a very marked difference between the type of land in the home place, between the east and west and there is a difference of soil type between those lands lying east of the canal and those lying west of the canal and the lands lying east are inferior and I placed an average of 1,000 acres of $50.00 an acre and there has not been any change in that since March 11, 1929.

"Q. Do you remember these questions being asked you before Judge Bourquin in the Federal Court?

"What in your opinion was the value of that home place per acre on the 16th day of April, 1926?

A. Well, there is about I should judge eight hundred or a thousand acres of it in the drainage district and in the Glenn-Colusa District.

Q. Give us the value.

A. About a thousand acres I would put it at forty or fifty dollars and the other eleven hundred about seventy-five to one hundred dollars an acre. [133]

Q. Which is the land value, in your opinion, forty or fifty dollars an acre?

(Testimony of John H. Graves.)

A. Averaging it, I said fifty dollars.

Q. Why did you say forty then?

Mr. FREEMAN.—He didn't say forty then. He said 'forty or fifty.'

Mr. BELIEU.—Now, he says fifty.

A. It is only my opinion. I am not an expert in soil conditions, but from the sales of land made in the county and through this territory I am merely giving my opinion of the value of the land."

I would not say the 320 acres was worth $50.00 an acre by virtue of any products and I wouldn't say that particular acreage was worth that by reason of any sales of like or similar soil type in the vicinity. It is true that there has been no sale of similar soil type sold in this county or any adjoining county for $50.00 an acre. It is in the reclamation district and the reclamation district assessment is about $15.00 an acre and I understand the irrigation debt against it for bonds issued is $14.00 or $15.00 and according to the last notice I had from Mr. Durbrow it was cut down to $14.00 and that would make $29.00 an acre against that land.

I am familiar with the lands in this section and the Ellison section south of town is similar in type and similarly situated and sold for $13.00 an acre cash, and the Ellison land is adjacent and this is better land than the Ellison land and the Ellison land is a mile on the highway and a mile and a quarter nearer town. There is red clay alkali field runs northwest and southeast through the Ellison

(Testimony of John H. Graves.)

section, Stewart land, Spaulding's ranch and Tweeds that isn't fit for anything. I haven't seen any crop on the [134] 320 acres lying east of the canal. The $50.00 valuation is that land running west of which several hundred acres has been in rice for several years and I know it has been there two years as I saw two crops growing on it, but I couldn't say all the years and I think Louie Jones had a crop of rice on there some two or three years ago. I have observed land of the type that I indicate as laying west of the canal which is now devoted to rice selling in this community in the last five years for $50.00 cash, and I mean that E. E. Pearson Tract a little west of that and north of the road and I have in mind the piece north of the road known as the old Joe Gannion place, the bank of Willows *use* to have and that was taken on a mortgage but I do not know who the land was sold to, but there have been two or three sales made out there for cash, which I can't recall right now but I can perhaps give you a half dozen if I had a chance to look it up, but I don't know of any right now. This sale I speak of was not a forced sale. But it is not a fact that land values now are at a low ebb or have been since August 16, 1926, and it is not a fact that land values are at the lowest ebb ever known in the history of the Sacramento Valley.

Jim Snowden and Wash Snowden when they bought their land paid $35.00 an acre and to-day you can't buy it for a $100. They bought their

(Testimony of John H. Graves.)

land about 25 years ago and part of the old Proulx place sold for $65.00 an acre.

I don't compare the Proulx place with the best land of the Barceloux land and the west end of the Proulx place you can't get water on.

Some of the land in the Glenn Colusa Irrigation District is a drug upon the market. It is true that when you get above 80 acres of land in the Glenn Colusa Irrigation District you are considered to have an elephant on your hands and a drug on the market [135] and it won't carry itself but that is looked upon that way a great deal by your own citizens and when you hear of other people in the state fighting for water in the San Joaquin Valley and other parts of the state we claim our land is worth $100.00 an acre if we had water on it.

With reference to sale of lands of similar soil types and quality for the figure of $50.00 an acre for the last five years I can't recall any now but I think there is some further east in the district of just about the same soil. I am acquainted a great deal with the holdings of the Superior California Farms Land situate in the Glenn Colusa Irrigation District. I didn't handle the deal where a sale is made to George Otterson of 80 acres of land which has a $75.00 irrigation improvement system on it for $60.00 an acre nothing down to be paid out with labor and I know where it is situated but I don't know what he paid for it.

I base my statement that the westerly portion of the home place as being worth $100.00 an acre

(Testimony of John H. Graves.)

by the two Snowden sections right next to it are mortgaged to the Bank of Willows for $54,000.00 that averages $90.00 an acre and the mortgage was made about 3 years ago and it isn't paid off yet. The improvements on that ranch are ordinary farm building. I closed the loan myself with the Bank of Willows. There is not any difference with the soil type or the drainage or condition of the west portion of the Barceloux land with the Snowden land. I didn't particularly base my opinion on the productivity of the land, for land has a holding value as well as a producing value. I do not know what the productivity of the Barceloux place has been in the last ten years and I haven't had occasion to investigate.

The Boyd, Snowden and Domonoski lands are all of the same grade and on the last ten years has been devoted to dry farming crops, [136] but I do not know what crops they had off of it. I based my opinion as to the value of the west portion of the land upon general conditions and the value of lands over there and on account of some sales and the crops raised and in the last five years one sold for $115.00 an acre cash to a man named Lederer, 400 acres, the Debenpeck place, and there are about 60 acres of alfalfa in that and the improvements didn't amount to anything only the fence and there are possibly three or four wells on the place. It cost different prices to construct irrigating wells for the purpose of developing water for irrigation, it depends upon how far they have to go for water, and I couldn't tell you what the wells cost and

(Testimony of John H. Graves.)

the stand of alfalfa on an acre of land increases it considerably $100.00 an acre I presume if you have a good stand. I don't know of any areas in the vicinity of this land being sold within the last three years for $100.00 an acre and that is the only tract I am acquainted with and I am not acquainted with the taxes on the home place, and I don't know how much reclamation taxes they pay and I do not know exactly the assessed valuation of the home place. I think the Longmire place in its present state is worth about $80.00 an acre, but I know nothing about the productivity of that land or for the purpose of which it has been used in the past and such things do not enter into my estimation of the $80.00 an acre. I have seen the land in grain but I don't know what yield it was. Virgin land would probably be worth more than land that has been farmed all these years, but virgin land does not exist any longer. The land has been farmed ever since I have been here and my opinion is that the land is adapted now to the further culture of dry crops and in my opinion as a farmer the dry crop yield would be 18 or 20 sacks an acre and I have seen some pretty crops on this land, but I do not remember having observed any crops in any particular year but as a farmer by looking [137] at a crop, I am able to determine the ultimate yield and I understand White Markham got some good crops out there. The possibility of irrigating on the land entered into my idea of the value. I presume that there is water to be had on the land and Ed. Ball had a pump on his land and he irrigated

(Testimony of John H. Graves.)

ten acres but I don't pretend to know the possibility of developing water on that tract and there is water on the Marshall tract and the Pierson tract where they have wells and they all have water. I know that there is no project on foot now to develop water for that land and as far as any water at this time is concerned it is out of the question and impracticable.

"Mr. BELIEU.—If the land was cultivated every third year, one-third of it farmed every year, or a crop on the whole of it every third year, by a practical farmer, to wheat and barley, and an annual yield on an average yield of eight to nine sacks of barley and from five to six sacks of wheat on one-third of it, with the present prices of grain, would that influence your mind as to the value of this land?

"A. No, it would not unless I knew who the farmer was because there is different types of farmers."

The question of productivity or yield that can be obtained from a piece of farm land would not influence me in determining the market value when the land is in close proximity to town and a good highway through it and close to the railroad, I say no, I consider it a very reasonable price. You asked me a few minutes ago if I knew what it is assessed for, its about fifty dollars an acre and he is assessing what he figures is fifty per cent. The land on the home place is assessed from thirty-five dollars to fifty. When I fixed the market value of

(Testimony of John H. Graves.)

this property I did not take into consideration the assessed value and I did not take the opinion of the assessor but his and my opinion agree. I know the land that was [138] sold to J. E. Knight in the last two years for $55.00 an acre and the soil is similar to the Longmire place and I am also acquainted with Jim Feeney's purchase of 3,000 acres of the Glide land for $40.00 an acre and I know that one or two of the flat sections were held back because he wanted $100.00 an acre for a flat section and he paid cash for the rolling hills and some of the ranch that Lulu Glide held back at $100.00 an acre was the same grade of soil, that is rolling hills that can't be irrigated. I am acquainted with the Willard purchases of the Ellis land west of town some 1,535 acres and I think it was sold for 75,000.00 and a good deal of that is rolling hills but it is not better land than the Longmire place and some of it sold for $50.00 and some of it for $65.00.

I am acquainted with the Mills sale of 5,400 acres of similar land and that was sold for $35.00 an acre and it is rolling hills, the same as the Glide ranch and there is not any more market in this vicinity for that type of land than there is for any other and there is no market for anything you have unless a person wants it.

"Q. As reflected in land activities you would say there is no market for the sale of valley land.

A. Certainly. We know that agriculture conditions all over the country are in bad shape. There is no question about that, but because you simply

(Testimony of John H. Graves.)

refuse to farm lands because it costs too much is no reason why the land is not worth anything."

Not many sales are being made, a lot of land is held very high.

I testified before Judge Bourquin I thought the Longmire ranch was worth between $75.00 and $100.00 and now I say it is worth $80.00—there is no change in value since I testified and I am trying to arrive at a reasonable value of the property from the experience of 20 years appraising land. I do not remember of appraising the [139] Longmire ranch for the Government at $60.00 an acre. I know we appraised the Jim Boyd land at $80.00 and all that character of land there at that price. I do not know what it costs to build office building of the Peter Barceloux Company, and I can't say that there has been any decrease or increase in value. Its a very good location and is like all other property you have to find a purchaser. Well, you can't sell anything—that is no reason why it isn't worth anything and I can show you two buildings in 1893 cost $8,000.00 and both of them sold at $4,000.00 simply because they were vacant and the man wanted to get rid of them and you have to pretty nearly give it away in the market to-day in some cases. The fact that this building cost $23,800.00 in 1910 when it was built would not have any bearing upon my valuation or estimation that it was worth $30,000.00. It would cost you $10,000.00 or $15,000.00 more to build it now.

In testifying in Sacramento I valued it at $30,000.00 or $35,000.00 I am not sure and I don't

(Testimony of John H. Graves.)

remember. The rentals or earnings does not reflect the value in my opinion and I haven't any idea what the taxes are upon it and I do not know what the building earns and some buildings in town are not earning anything but that don't establish the market value and has nothing to do with it. In these estimations I am only taking into consideration the earnings of the property to a certain extent.

"Q. To what extent has it influenced your estimation of $30,000.00.

A. The cost of the building and the future value of it and income, and there is always a holding value."

That building is assessed at $13,000.00 and the real property for $3,000.00 that is $16,000.00 and allowing his assessment for fifty per cent would make it $32,000.00 and he has evidently placed pretty near the same value on it I have. [140]

The assessors value on it is only his opinion and we can't any of us tell exactly what it is worth and I just went down and checked up to verify my own opinion.

"Q. The holding value of it, its prospective value largely influenced you what it will be worth when things look up? A. When things are normal.

Q. Things are not normal in lands in this Valley now?

A. No. They are twenty-five per cent short of normal. They are all over the Nation.

Q. That is true of this county isn't it?

A. Yes."

(Testimony of John H. Graves.)

The rice industry slump in 1920, but that did not alter the grain land so much as it did the rice land.

I said the garage property, that is the lot and building are worth from $5,000.00 to $6,000.00. The building I appraised on the garage property is south of the garage. I think the valuation of $5,000.00 on the home residence is fair and I have known it since it was put up and the building is twenty years old and it has been well taken care of and you go around and look at some of the Crosby buildings for $5,000.00 and you would consider it worth more than that and when you compare those or with other buildings and what they cost you have got to form your opinion. I assume that house could be sold to-day for $5,000.00, but I don't know. Not all the sales of houses sold in Willows have been sold on the monthly rental basis but I don't know that I could name them now, but I think Mr. Barceloux himself sold his home to Mr. Stinger for cash and we closed the deal and I know it was over $4,000.00 and we sent the check to Mr. Barceloux in San Francisco.

I placed a price of $75.00 on the Dunlap place. I don't know just exactly of this ten acres. It has been pointed out to me [141] but I know it is in the Hocheimer tract which I understand it is and it is up in that neighborhood part of the Cartenburgh tract on that low flat land.

Part of the Hochheimer land was owned by a man named Dunlap and I knew him quite well and suppose he was the one this was referring to.

(Testimony of John H. Graves.)

Dunlap was on the east side of the railroad in the Cartenburg tract and I understood it was in the Hochheimer tract and that would make a difference in my mind as to what it was worth and I put it $30.00 an acre the same as I did that other.

I am acquainted with the Cartenburg land contract and the acreage that Robinson bought next to the railroad, and there is something wrong with the title and I put all that land in there at $30.00 and if I put $50.000 on those other lots I will put the same price on this. There has been sales for more than that.

Cross-examination.

(By Mr. HUSTON.)

I placed a valuation of $25,000.00 on the Fortini land on 40 acres and it is what is known as the old Billy Hartford place—lots 43 and 47 in the loam ridge tract and the soil is what you would call a friable soil and *it* not a heavy dob*y* and some gravel and it is a different type of soil than other tracts around here.

In placing a valuation on the lands of the home place in arriving at that market value I allowed for the fact that part of the land was in Glenn Colusa Irrigation District and considered that in putting the value on these 1,000 acres but I didn't allow any particular sum.

I do not know whether a part of the home ranch which is in [142] the Glenn Colusa District came in at the time of the organization or subsequently, but the part west of the canal I presume it did be-

(Testimony of John H. Graves.)

cause there wasn't any land taken in to the district west of the canal until afterward. I have read of the suit brought by the Holland Land Company against the Glenn Colusa Irrigation District but I don't know anything about irrigation laws where there is a shortage of water, the lands in the district upon its organization have first call upon the water and those lands coming in after its organization only get water when there is sufficient water supply and had I known that I would not have considered that in giving my opinion and even if the water was cut off you could get water but it costs something of course and there is electric power there. I am not placing a valuation on this land from an irrigation standpoint or that it is susceptible to irrigation and I am placing what I consider a reasonable value according to what conditions have been for ten years and if the home place was under irrigation I don't know if it would have a different value unless it was all in alfalfa and fruit. I do not know of any fig orchard in the vicinity of Willows but Mr. Domonoski has 5 or 10 acres of the finest grapes there are in the state and it is just a few miles over there and it is a commercial and private vineyard and anybody can go out and pick them and buy them, but he does not make it a part of his farming operations.

The Neet Garnett place in the vicinity of Willows and a couple of miles west of the Domonoski land is the same type of soil and has an almond orchard on it and it is on the flat but near the hills and the

(Testimony of John H. Graves.)

same kind of soil and some ten or twelve acres. He does not confine all his farming activities to almonds but the yield is very good and it is one of the best almond orchards and has been there for 20 years and Glenn County is recognized as one where [143] almonds are produced profitably in several localities, namely, Hamilton City, but it is not the same soil as this and not similarly situated.

Glenn County is not known as a fruit-producing country but it is just coming into that in many ways.

At this time I don't know of any other tract of land the same type of soil similarly situated in Glenn County or in this vicinity which produced or grows any other crops than wheat barley or rice as is grown on the home place, but there is some, I suppose.

I placed a value of $1500.00 on the two lots where those colored people lived and $6,000.00 on the garage property, a total value of $7,500.00.

The main Barceloux building fronts on Sycamore Street and the printing office is on Butte Street.

I never made any soil borings on the home ranch. It is mere guess on my part. I have dug right here in town but not out on the home place and I did not make any borings on the Longmire ranch and that just my opinion of it and there are places that are shallow and some that are deeper and there are spots of alkali on the Longmire place but I don't think as many as 160 acres of the Longmire place is alkali

(Testimony of John H. Graves.)

and I just put an average on it and I know some of it is not as good as other parts.

Redirect Examination.

(By Mr. WULFF.)

I don't appraise for the United States but perhaps I made an appraisement for H. J. Barceloux because in many cases the Federal Appraisers are always higher than I and in every case we ever had they were and the affidavit I made in opposition to the appraisement might have been introduced in this matter. [144]

I appraised this home place and the Longmire ranch in the matter of estate of Peter Barceloux deceased on the 28th of September, 1925, which covered the value of the property at the time of Peter Barceloux's death which was I think in December, 1918.

In appraising the value of the home ranch in determining the value I included the improvements and the improvements are necessary for farming purposes and the improvements are not considered as separate. Just the necessary buildings to farm the property with you have to have them for the shelter of your grain, tractors and machinery and the same is true of the Longmire ranch.

In valuing the Barceloux building and lot I valued it as one unit and the property as a whole and figuring on the increase price of building material now and at the time it was built and as to all these

(Testimony of John H. Graves.)

values that I had testified to I testified to them as a unit, the improvements and the land.

I think two or three times Mr. Barceloux and I had the matter up regarding the federal appraisement, and so forth, and you know sometimes it has been called to my attention that people will want a very large appraisement sometimes and then they will want a very low appraisement.

TESTIMONY OF ERNEST EIBE, FOR COMPLAINANT.

ERNEST EIBE after being duly sworn, testified as follows:

Direct Examination.

(By Mr. FREEMAN.)

My name is Ernest Eibe and I am county assessor of Glenn County and have been since July 11, 1928, and part of that time I was supervisor for five and one-half years and before that I was a farmer and have been a farmer most of my life. [145]

I am familiar with the lands of Peter Barceloux Company which is divided into two tracts, one south of town the home place, and one north of town the Longmire place and I have a record of the assessed valuation and I am familiar with the land and have been over it and I have farm land within seven or eight miles of it and I know the kind or quality of the soil of those ranches and what they are adapted to and as county assessor I am familiar with the property values of land in Glenn County and as to

(Testimony of Ernest Eibe.)

the nature of the soil and its productivity and the kinds of crops that can be successfully raised upon the lands and I am also acquainted with the improvements upon the land.

The property referred to as the home ranch is in the vicinity of the State Highway and is about a mile from the nearest edge and the property is two miles from the edge of the town of Willows and I am acquainted with the sales of land in Glenn County and whenever I get a chance I try to inquire into the price of the sale, but there hasn't been very much land selling around here lately and I am acquainted with some of the sales and it is my duty to appraise the land as to cash value.

In my capacity as a farmer of lands in Glenn County I am familiar with the soil conditions and in particular the land belonging to the Peter Barceloux Company known as the home ranch and the Longmire ranch and I have a pretty good idea of the value of lands in and about Willows and in and about the vicinity of the Longmire and home ranch and I have a pretty good idea as to the value. I have an opinion as to the value of these lands.

The type of soil on the Longmire ranch is a little clay and grain, wheat, barley, alfalfa or trees can successfully be grown on the Longmire ranch and I am familiar with the improvements on the Longmire ranch and they are a house, two barns, shed, tank and [146] windmill and the property is fenced, and the property is one mile from the State Highway and the county paved highway is one mile

(Testimony of Ernest Eibe.)

from it and the value of the northwest quarter and the fractional southwest quarter of Section five containing 314 acres as to its market value is $100.00 an acre and the market value of the fractional section 6 on the Longmire ranch containing 613.17 acres is $100.00 an acre and the value of the improvements I judge $4,000.00.

The market value of fractional northeast quarter containing 157 acres I would put the market value at $100.00 per acre and the fractional southeast quarter of section five containing 156 acres I would place the market value at $125.00 an acre.

I am familiar with the property known as the home ranch and the soil type which is about the same as the as the Longmire I think excepting the east part of it which has alkali in it and the improvements on the home ranch are a barn, house, and blacksmith-shop and rice buildings and the property is fenced and in my opinion the market value of the west half of section 20 containing 320 acres is $100.00 an acre.

The market value of the fractional north half of section 29 containing 312 acres is around $70.00 an acre.

The east half of section 30 containing 320 acres is $100.00 an acre and on the east half of 30 there are not any buildings.

My opinion is the fractional west half of section 30 Township 19 North, Range 3 West, containing 305 acres, is $100.00 per acre.

The east half of Section 20 less 16.3 acres for

(Testimony of Ernest Eibe.)

canal purposes and containing 304.70 acres is $75.00 an acre.

I am familiar with the so-called Cartenburg tract and it is east of the highway that is State Highway and about a mile from the [147] town of Willows and the soil is clay and it is farming property and wheat, barley and alfalfa can successfully be raised on the property.

I am familiar with the market value of Lots 25, 31, 40 and 41 of said tract and I place the value about $1200.00 lot and the value of Lot 30 containing 10 acres is about $1200.00.

I do not think the market value has changed between August 16th, 1926, to date.

I have before me the assessed valuation.

Cross-examination.

(By Mr. HUSTON.)

I based my testimony as to the market value of this land on former sales, on the Locous sale which was part of the James Boyd ranch, and that sale was made since the first of March of this year, and twenty-eight acres were involved, and I think it was sold for cash and brought one hundred dollars an acre, and the type of soil was similar to this. It was clay loam, and not all of the land lies along a slough and is alluvial soil.

Barley and wheat was produced on the land and the only improvements is the fencing and it does not lie within the boundaries of the Glenn Colusa Irrigation District or Reclamation District No.

(Testimony of Ernest Eibe.)

2047, and I couldn't say positively, but I think the land is assessed for fifty dollars an acre and I couldn't say how long it had been assessed for that.

I was a member of the Board of Supervisors for four years and sat on the board of equalization and the matter of equalization of taxes and I was generally familiar with those lands, and as near as I know the assessment has never been changed.

The other sale I know of is the Devenpeck land which adjoins the Longmire Ranch, and four hundred acres were involved in [148] that sale and I think it was sold for cash and as to whether the purchaser took up the mortgage on that property I couldn't say, and I think it was sold for better than one hundred and fifteen dollars an acre which I know by the revenue stamps, and I think the sale occurred about 1918. The soil of the land that was sold and of the land here involved is practically the same, and the same crop, and on the land that was sold there were wells on a part of it, and I think three wells in all and I judge they would irrigate about fifty acres. I haven't set foot on the property, but I have been by it this year.

I think about six hundred acres of this ranch can be irrigated, and in my opinion there is no difference in the value of land with a stand of alfalfa on it than one without, and I do not make any distinction.

Oh, I see what you mean, alfalfa land would be worth more, certainly, around thirty or forty dollars an acre more, and in my judgment land with

(Testimony of Ernest Eibe.)

alfalfa upon it will only bring thirty or forty dollars more in the open market, and the part of the land of the Devenpeck place with alfalfa growing upon it is one hundred and forty to one hundred and fifty dollars an acre and I think it is assessed at fifty dollars an acre. Alfalfa land is improved land and the assessor assesses it separately the same as unimproved land and the land is always assessed for the same value in Glenn County whether it has alfalfa or trees or whatever improvement it has on it and the alfalfa is assessed separately and has nothing to do with the land and the reason the alfalfa wasn't assessed on this land is it wasn't on when I came into office and I presume it is a very old stand of alfalfa. Since coming into office I have corrected assessments when I thought any changes should be made and there are two changes up in the Orland district and one down on the land east of the railroad track, the name of the land I have forgotten. [149]

Since coming into office I have not changed the assessed valuation of lands similar to the Barceloux lands, and whether any changes were made previous to my time I don't know.

I don't think there has been any change in the market value of land within the last five years, but within the last ten years yes, and I think lands were generally considered worth a little more during the time that rice is being grown. I mean up to 1920. They started to drop in 1920, and the land values in Glenn County have dropped since then

(Testimony of Ernest Eibe.)

and I think they were paying more than they were worth, and you could not go out in the open market since 1920 and sell any of the land for what they were sold prior to that time and you could not have gone out in the open market and sold any grain land since 1920 for what they sold for prior to that time, and as a matter of fact all land values have been more or less stagnant generally speaking for all lands since 1920.

"Q. And there have been practically no sales for lands and what sales were made have been at a lower value than those sold for in 1920?

A. A short time prior to 1920.

I couldn't say how far back. Since I have been assessor of this county there have been many foreclosures on grain and rice land and I know of some pieces that have sold in foreclosure proceedings for less than their assessed value but not similar to the Barceloux land and I know of no land similar to the Barceloux land being sold for delinquent irrigation taxes or delinquent reclamation taxes and lands thus sold were poorer lands than the Barceloux lands.

I know of no foreclosure sales similar to the Barkceloux home place lying east of the canal.

I know of no land within the boundaries of Glenn-Colusa Irrigation District of similar type and similarly situated as the [150] Barceloux land being sold for delinquent, irrigation taxes. I am pretty familiar with the different characteristics of the soil of the home place and there is a great deal of

(Testimony of Ernest Eibe.)

difference in the east and west land of the premises as there is alkali in the lands east of the canal and I do not know of any foreclosures of land with the same proportion of alkali as that of the land east of the canal and the land east of the canal is assessed for $35.00 and $45.00 an acre and I think I testified yesterday it is worth $70.00 an acre.

The land west of the canal, that is the entire tract is assessed at $50.00 an acre.

Taking the home place as an entire tract my opinion is that land if sold in the open market in 1926 for cash I think would have brought $100.00 an acre, that is the ranch as a whole and I think there are two sections and a half—three sections and a half in the home place and considering that there are three sections of land in the home ranch if that tract was sold as a whole in the open market for cash on August 16, 1926, would sell for $100.00 an acre. It is my belief that the land could be sold for that and the values that I gave you yesterday were cash values and I used the assessed valuation as a guide—not entirely. I only used the assessment card when you mentioned sections and half sections and I referred to the card to see what part of the ranch you meant.

It is not true that every valuation placed by me upon these lands was twice the assessed valuation. The Longmire ranch taken as a whole and sold for cash in the open market on August 16, 1926, would have sold for $100.00 an acre straight through.

I placed my opinion of these land values upon

(Testimony of Ernest Eibe.)

the sales of Lederee and Lacous land. I haven't any knowledge of any sales of land within five or six miles of the Barceloux home ranch, excepting the lands I mentioned, and they are within five miles. [151]

Yes, I can mention another sale; the county bought a piece of land for $100.00 an acre within a radius of five miles from the Barceloux home place since August 16, 1926, for the purpose of a road and bought about an acre of it. I have an idea about the sale of the J. H. Ball property to J. E. Knight which land is on the railroad track north of Willows, but I don't know what it was sold for and there is very little difference between that land and the Barceloux land, except that the Ball lands are overflow lands and floods every year, and I think it is assessed for $50.00 an acre.

The land purchased by James Feeney of the 3000 acres of the Glide ranch for $40.00 an acre is hill land, some of it it flat and assessed valuations on the Glide ranch varies according to the land, and I would say it is assessed from $30.00 to $35.00 an acre and there is a distinction made in flat and hill land but I couldn't tell you the difference.

I know about the sale of the Ellis ranch to Willard of 1,535 acres but I don't know about the price. I know nothing of the sales by Henry St. Lewis to Mr. Michael of 160 acres of land at $60.00 an acre. If you mean the lands of Antoine St. Lewis lies near the foothills, and I think it is assessed at $32.00 or $35.00 an acre.

(Testimony of Ernest Eibe.)

The sale by the Mills estate of 800 acres to Campbell Brothers at $30.00 an acre was range land. I know the John E. Ellison land was sold but I am not familiar with it and it lies east of the Barceloux land and there is no comparison between it and the Barceloux land for the Ellison land has a great amount of alkali in it. The difference between that and that part of the Barceloux land east of the canal is there is more alkali in the former. A very poor crop of rice has been produced upon the Ellison land and arriving at this market value I took into consideration what these [152] lands would produce and I think grain, barley and wheat could be grown if properly farmed and I don't know what they are producing now and in the line of revenue I assume it would average seven per cent on the investment. If they raise 20 sacks of barley it will produce that much and the land east of the canal will average 20 sacks every other year and that land east of the canal is cropped every other year or every two years and that is the general rule, but what the highest yield per acre on that land I don't know, but I don't know about crop production produced by the Barceloux land. The reason I say it would earn seven per cent is that if the land was properly farmed it will raise 20 sacks per acre, I don't think it is properly farmed and is not sheeped enough. In order to be properly farmed it should be sheeped and I think 1500 or 2,000 sheep should be run on the Barceloux land right straight through and the same condition holds

(Testimony of Ernest Eibe.)

true as to the Longmire place and to make the ranch produce they should have sheep running on it, a big ranch like that and the most successful ones do that have raised the biggest crops. The fact that it has been improperly farmed and the tract of land that has not been well farmed will sell for just as much as a tract of land that has been properly farmed.

I am familiar with the Dunlap place in the Cartenburg tract consisting of 10 acres and in my opinion that tract of land would have sold for in the open market for cash on August 16, 1926, at $100.00 an acre and in expressing that opinion I did not have in mind any sales in that locality and I know of no sales in that vicinity in the last five years. I know of a sale within the last ten years, the Coppidge sale and sold about two years ago but I don't know what it sold for.

I am not familiar with the Blakely land east of the railroad track. I know Lots 25, 30, 31, 40 and 41 of the Cartenburg [153] tract and these lots if sold on August 16, 1926, in the open market should bring $100.00 an acre because that is what the land is worth. Whether there had been a sale there in 10 years I don't know.

Part of the Blakely tract is subject to overflow but I don't think that would have any bearing upon its market price and it would sell as much as the Lacous place.

In placing the value on the eastern part of the home place lying east of the canal and fixing the

(Testimony of Ernest Eibe.)

value per acre I did not make any allowance for any reclamation or irrigation assessment against those lands. The irrigation assessment is about $2.35 an acre and I don't know just exactly the amount in Reclamation District No. 2047. The taxes on the home place a year per acre I think are $2.60 out there in Penoyer and it changes from year to year. Assuming it would earn six per cent I took into consideration the county taxes which runs $2.60. I am familiar with the part of the Barceloux land which lies east of the canal and that part lying in the Glenn Colusa District and that part in Reclamation District No. 2047 and I figured the annual tax bill per acre of that part lying in Reclamation District No. 2047 at $8.00 per acre and I assume the tax of the Glenn-Colusa Irrigation District each year upon that same land would be around $2.35 and the state and county taxes $2.60, but I didn't mean $2.60 an acre, I meant the rate and I never had occasion to figure out the taxes or Reclamation tax or the irrigation tax per acre upon that land and I never figured the total income upon the land to arrive at the earnings of six or seven per cent and that was my belief that that would do that and that is how I arrived at it.

In order to produce a yield of six or seven per cent each acre would have to produce $30.00 and I figured it ought to yield 20 sacks of barley and the rest of the land that is in rice ought to [154] yield 30 or 40 sacks, but I have never tried to figure out whether Barceloux land would yield seven per cent each year, but I figured it out on other pieces

(Testimony of Ernest Eibe.)

and my own land which I used to own but parted with it under foreclosure, because I could not pay the interest and taxes on it and I couldn't pay the principal.

It is not a fact that the land values which I have given as to farming property has been primarily based upon what they are assessed for and I am better informed as to the values of farm property than I am as to town property. I know the Ellison land was deeded to the Glenn-Colusa Irrigation District for taxes and it hasn't been farmed for years and there has been quite a few tracts of land sold for delinquent taxes in the Glenn Colusa Irrigation District and Reclamation District No. 2047 and there has been no reversion of those lands.

Redirect Examination.

(By Mr. FREEMAN.)

The Ball place which I said was sold to J. E. Knight for $55.00 an acre is on the west side of the railroad track. It is about half mile from the Cartenburg tract, that is, between the corners of the tracts.

The Feeney land of 3,000 acres at $40.00 an acre is mostly range land and portions of it right on top of the hills.

The St. Lewis-Michel sale at $60.00 an acre is bottom land.

The lands taken for unpaid irrigation assessments are not as good as the Barceloux land, no comparison.

(Testimony of Ernest Eibe.)

The lands in Section 28 which are like the Ellison land are only adaptable for pasturage purposes and I have never heard of any lands taken for irrigation or reclamation district assessments that were as adaptable for general farming as the Barceloux Company lands. [155]

No lands coming under my observation as going to either one of the districts are comparable to the Barceloux lands that lie east of the canal.

Recross-examination.

(By Mr. BELIEU.)

I know that the lands formerly owned by the Mercantile Trust Company of San Francisco in Section 28, Township 19 North, Range 3 West lying south of the Ellison piece went to the district, but I didn't know that on September 5, 1929, it was deeded for $1,830.00 and that the sale price to the District averaged $2.86 per acre and was never redeemed.

I am acquainted with the southeast quarter of Section 16, Township 19 North, Range 3 West, but I don't know that sale was made to the district of that land on August 24, 1926, for $416.00.

I am not acquainted with the fact that the district took a deed on September 5th, 1929, with an added cost of four hundred fifty-eight dollars and ten cents, and that the sales price to the district was two dollars and eighty-six cents per acre, and they did take a deed and that there has never been any redemption of the property.

(Testimony of Ernest Eibe.)

Respecting the taking over August 24, 1926, of the west half of Section 16, Township 19 North, Range 3 West by the district for $808.74, I don't know the amount for which the land was taken over by the district under Certificate No. 675 in August 1926 and subsequently taken over by deed September 5, 1929, and the lands that you have called my attention to are about three miles diagonally southwest of 320 acres of the Barceloux land lying east of the canal.

Section 28 joins the Barceloux land and 16 is northeast and diagonally across. I am acquainted with the east half of the [156] southeast quarter of Section 13, Township 19 North, Range 3 West, consisting of 80 acres of land belonging to H. M. Garnett, but I don't know that that land was sold to the district in August, 1926 for $208.00 and that they took a deed to it on September 5, 1929, for $229.30 or an average of $2.86 per acre—I know the tract of land but I don't know of any penalties or costs. I am acquainted with the fact that all of these lands were lost to the owners for failure to pay taxes but I don't know the amounts and I know quite a number of tracts have been lost to the owners in Glenn-Colusa Irrigation District and Reclamation District No. 2047 for failure to pay taxes and assessments. I don't know that there are large areas, but know that there are particular pieces and I have no idea as to the acreage.

(Testimony of Ernest Eibe.)

Redirect Examination.

(By Mr. FREEMAN.)

Part of the west half of Section 16 will compare favorably in quality with that portion of the Barceloux land east of the canal and it is the practice of the irrigation district to assess all lands in the district in the same amount and whether the Barceloux Company paid the irrigation and reclamation taxes I don't know.

The land in Section 12 and 13, Township 19 North, Range 3 West as compared in quality with the Barceloux land is a pretty good piece of land and it is adobe land. I know the Barceloux people have a small band of sheep on their property but not large bands from year to year and the sheep have been assessed and are assessed at $4.50. [157]

TESTIMONY OF GEORGE A. BARCELOUX, FOR PLAINTIFF.

(Called as a Witness Under Section 2055, Code of Civil Procedure.)

GEORGE A. BARCELOUX, after being duly sworn, testified as follows:

Direct Examination.

(Examined by Mr. GEORGE R. FREEMAN, One of the Attorneys for Complainant.)

My name is George A. Barceloux. I am president of the Peter Barceloux Company, the defendant named in one of these actions. I am also an offi-

(Testimony of George A. Barceloux.)

cial of the Bank of America at Orland, California, and prior to the time the Bank of America took over the Bank of Orland I was connected with the Bank of Orland and as official of the Bank of Orland was president and I was president eighteen or nineteen years and to whom the Orland Bank was first sold, I don't know, we dealt through the Bank of Italy and there was a contract in writing between the Bank of Orland and the purchasers of the Bank stock.

The contract was made with the French American Corporation and I have a duplicate copy of the agreement which was never signed and to my knowledge a contract of this kind was not signed.

(The contract was admitted in evidence and marked Plaintiff's Exhibit No. 10.)

The sale of the stock of the Bank of Orland was made in accordance with the terms of this contract and the sale was made at $100.00 a share.

The stock of the Peter Barceloux Company in the Bank of Orland and all the stock of that Bank formerly owned by H. J. Barceloux were sold and transferred under the provisions of this contract and after the sale of the Bank of Orland to the French American the United Security Bank & Trust Company operated the bank and I was [158] in charge of the bank all the time it was operated by the United Security Bank & Trust Company and I am still in charge and have been since the Bank of Orland sold out and it is now operated under the name Bank of America, Cali-

(Testimony of George A. Barceloux.)

fornia. There was a change made in the administration about a year ago and it might be the United Trust Company did operate it awhile until they changed their name and prior to the time the United Securities Bank and Trust Company took it over.

Under the terms of the contract of sale of the stock of the Bank of Orland it was paid for in cash and there was an option given to take stock of some other corporation in lieu of cash—United Bank & Trust Company I think under what we bankers call a workout agreement and the French American Corporation started to handle the workout agreement, but I think they have changed their name and its successors are handling it now and we have dealt with different officers in the Bank of America, California and this contract (Exhibit 10) is the only one and was not modified.

(It was here agreed that all exhibits introduced during the trial of the main case should be considered in evidence before the Master.)

Under the terms of this agreement the Peter Barceloux Company transferred to the French American Corporation the stock of the Bank of Orland obtained from H. J. Barceloux and there were two certificates, one for five and one for four shares, amounting to nine shares, and also one certificate for sixty-four shares and from that nine shares of stock we received four or five shares of United Bank and Trust Company in exchange at $194.00 a share.

The contract provides for the payment of $100.00 per share in cash and the bank, in addition, gave

(Testimony of George A. Barceloux.)

us the option to take United [159] Bank & Trust Company stock at $194.00.

Peter Barceloux Company owned seventy-five shares in the Bank of Orland and it was exchanged for stock in the United Bank & Trust Company at $194.00 a share and the shares of stock in the United Bank & Trust Company owned by the Peter Barceloux Company were exchanged for Transamerica stock. On September 9, 1928, we transferred to the United Bank & Trust 148 shares of Bank of Orland stock, which included the nine shares and the seventy-five shares, and paid $138.00 cash and received in exchange seventy-five shares of United Bank & Trust Company stock.

Subsequently we transferred seventy-seven shares of United Bank & Trust Company for Transamerica and we got one and one-third shares of Bank of America for each share of United Bank & Trust Company on June 24, 1929, and we paid out $90.00 in cash in that transaction. We received approximately one hundred and four shares of Transamerica.

The Peter Barceloux Company never listed its stock on any exchange and was not sold in the open market except when we sold the stock of H. J. Barceloux in Peter Barceloux Company. The stock of the Peter Barceloux Company is owned at this time by my three nephews, Elmer, Vernon and Ernest, and my sister and myself. Prior to August, 1926, H. J. Barceloux was a stockholder and there never has been any stockholder outside of the family.

(Testimony of George A. Barceloux.)

In 1926 Henry sold some of the Peter Barceloux Company stock to my sister, one share for I don't know whether it was $15.00 or $25.00 and outside of that there has been no other shares sold. I kept the books of the corporation since the summer of 1926, July of 1926. I have with me the original accounts of the Peter Barceloux Company from the 16th day of August, 1926, to date with the United [160] Bank and Trust Company, the Bank of America California, the United Security Bank & Trust Company and the Bancitaly Corporation.

The first statement you have consisting of seven pages is the commercial account of the Peter Barceloux Company commencing July 7, 1926. It was carried through in one account without distinction as to what Bank it was carried in.

(The account was here introduced in evidence and marked Exhibit 11.)

(The savings account of the Peter Barceloux Company was here introduced in evidence and marked Exhibit 12.)

The items in red ink indicate interest. As manager or the person controlling either the Bank of Orland or any succeeding bank I have not any other assets in my control and I haven't any books or records of any of the banks, Bank of Orland or its successors in interest, covering the liquidation of the assets of the Bank of Orland. Some of the property has been liquidated as set out in Schedule "A" (referring to Plaintiff's Exhibit 10).

The pencil figures in the right-hand column indicate what the individual owed at the time and the

(Testimony of George A. Barceloux.)

figures checked have been paid in full and the figures opposite these unchecked items represent amounts due and they will hold the $50,000.00 until all of these assets are liquidated and until the last dollar is liquidated and if they are not all liquidated we're just out that is all.

The Bank of Orland guarantees collection of the amounts and puts them up as security to cover the guarantee. We did not receive anything for our guarantee.

The Peter Barceloux Company had no choice in the matter or no voice because two-thirds of the stockholders sanctioned that contract and the other one-third had to accept it. [161]

Neither myself nor the Peter Barceloux Company put up that stock received in the exchange from United Bank and Trust Company as part of this guarantee that is mentioned in here—they did not have to put it up or any of the shares of stock of the Transamerica belonging to the Peter Barceloux Company. The certificate for 104 shares of the Peter Barceloux Company representing 104 shares of the Transamerica stock is with the Peter Barceloux papers in the Bank of Orland and all the Peter Barceloux papers are in my possession and the Orland Bank agreement account shown in my books of account has no connection with the testimony I am giving now.

Prior to the time this contract was made with the French American Bank, the Bank of Orland stock was not listed on any exchange. I am familiar with the market value of that stock prior to the sale

(Testimony of George A. Barceloux.)

on the 9th day of December, 1927, between the 16th day of August, 1926, and the 9th day of September, 1927, and I bought some at $80.00 a share, I think twenty shares from a real estate man in the city, I have forgotten his name.

The par value of the stock of the Bank of Orland between August 16, 1926, and the 9th day of September, 1927, was around one hundred twenty-five, I think, and I don't believe there was much change in that time.

At the present time the Peter Barceloux Company owns about 650 sheep and owned about the same number on the 16th day of August, 1926. The lambs were generally marketed right away. Our books do not show how many sheep we had in August, 1926, but I think they will show the number of lambs marketed in December, 1927, which will appear in the sheep account and that would be true of all lambs marketed subsequent to the spring, 1926. The sheep are run on the Longmire ranch by Elmer and part on the home ranch by George St. Lewis [162] and I did not have direct charge of making trades or sales of sheep for the corporation. The renters had charge and if sales of sheep were made on behalf of the corporation those sales and purchases made would be set forth in the sheep account in the Peter Barceloux Company books.

The corporation still owns the North Willows lots, described as being in Block 57 of North Willows.

On March 24, 1928, a meeting of the Board of Directors of the Peter Barceloux Company was held

(Testimony of George A. Barceloux.)

and there was a resolution passed authorizing the Company to sell to Pickett of a portion of Block 57 North Willows and that sale was consummated, but I don't remember whether it was the north or south half for $195.00 in cash. We got the cash eventually, a few dollars at a time.

There is also described in the books garage, machinery and tools but there is no machinery there and on the 16th of August, 1926, I think there was an old gas tank there and an old electric motor, but no tools and the gas tank and old electric motor are worth $5.00 maybe. As to the entry Bank of Orland agreement, that is that land you were trying to take away from us and you sold your interest to Scarce and Henry Barceloux had a fifty-eight thousandth interest and there is about twenty acres involved and the Peter Barceloux Company owned .289 interest. The land is not improved and is half a mile south of Orland and three-quarters of a mile west of the State Highway. It has no crops on it and never had and it's some of this valuable land that they are putting so much tax on that people won't even pay the taxes on and it has no market value and if it had we would have gotten rid of it long before and I have tried to sell it for any price I could get, and if anyone would pay the back taxes on it I would take $20.00 an acre for it, and you fellows wouldn't [163] pay the taxes on it and I wouldn't pay it for you. When you claimed an interest in there you did not keep your taxes up and I wasn't going to pay it and it would be like the paving tax we paid in there for you and you won't

(Testimony of George A. Barceloux.)

pay it back, and you tried to take the whole thing away and Henry's interest also.

The Cartenberg account referred to in my books is Henry's interest in seventy acres in the Cartenberg tract and that is in litigation and it has no value under those conditions.

As to the account of George St. Lewis in the books, it was in there when I took the books over and he claims he does not owe it so it is just staying in there. It is an account for $105.42.

Ernest Barceloux owes on an open account of date August 16, 1926, $76.71 and on August 17, 1929, the account is changed to E. J. and Vernon Barceloux $288.55 and it is my intention to collect interest on it.

The accounts of George Barceloux for $305.00, and Cora Gelinas amounting to $460.00 have been paid by the corporation.

Elmer Barceloux owed the corporation $747.14 on September 17, 1929, on open account. The open accounts of the boys are secured by their stock in the corporation except Elmer's. Elmer Barceloux's indebetedness is $747.17.

We have two promissory notes from M. and Ethel Fortini, one for $4,000.00 and one for $1,500.-00 and they are secured by a trust deed on Lots 43 and 47 of the Loan Ridge Tract. The $1,500.00 is secured by ten acres of land on Loam Ridge by a mortgage I think and the $4,000.00 note is secured by a second deed of trust on 40 acres of ground. The first loan on the $4,000.00 debt is held by the Federal Land Bank at Berkeley and the Federal

(Testimony of George A. Barceloux.)

Land Bank requires part of the principal to be paid every six months and the Fortinis [164] pay their interest pretty promptly, but I do not think the interest which came due in October is paid up now.

The corporation still has the Antoine Lewis and Mary Lewis note, which note is for $6,000.00 and is secured by a first mortgage on 60 acres of land and they are two years, I think it is, behind in the payment of their interest. It is not under foreclosure.

We also have the note of E. J. Barceloux dated December 5, 1927, for $2,637.78 and he owes us that amount and we have another from E. J. Barceloux dated March 16, 1927, for $468.57 and they are secured by eight hundred thirty-three and one-third shares of his stock in the Peter Barceloux Company.

We also have a note from Vernon Barceloux, dated December 5, 1927, for $5,073.67 which is secured, and we also have another note from Vernon Barceloux dated March 16, 1927, in the sum of $554.19 and that is secured by stock in the corporation. He has eight hundred and eighty-three shares, a one-third.

We have a note from Elmer Barceloux dated about the 16th day of March, 1927, in the sum of $15,995.16, and there is interest due on all these notes and the three boys won't pay their interest and I think that is all the money they owe. All of their notes are secured by their stockholdings in the Peter Barceloux Company.

(Testimony of George A. Barceloux.)

On September 14, 1927, the Peter Barceloux Company loaned to Ordell Neelson, Andrew Neelson, E. J. and Vernon Barceloux $7,000.00, all of which has been repaid to the Company. It was paid after harvest in 1928, in about July.

The books do not show the interest rate charged on the note against the boys but if you will read the resolution you will find we agreed to charge the boys six per cent for their part and charge Neelson eight per cent for his part. The other notes bear interest [165] at six and seven per cent.

The records also show a note of E. B. Nelson October 1, 1927, in the sum of $425.00 and we have that note but that is not the same man mentioned as Neelson and E. B. Nelson is a man who rented our corner and we had to take that note for the balance of the rent and we can't collect the money on the note.

The note of J. L. Kane is of no value and the notes of Barret and Nancy Small for $10,000.00 we accepted $2,000.00 on that for a release of a mortgage we had on the Glenn property and the notes were returned to the Smalls and no further obligations.

The note of C. A. Bogue is not any good and the note of the Sacramento Valley Realty Company is worthless.

The books show the amount received from the sale of 100 shares of Glenn County Garage Company stock and 75 shares of the capital stock of the Pacific National Fire Insurance Company has been converted into Transamerica and this was

(Testimony of George A. Barceloux.)

done on April 3d of this year and we got 37 shares and sixty-two and one-half cash and the Company got the cash.

I am familiar with the $16,000.00 loan that H. J. Barceloux had with the Crocker National Bank at San Francisco secured by ninety-five shares of Glenn County Bank, sixty-four shares of Bank of Orland and I believe eight hundred thirty-three and one-third shares of Sacramento Valley Realty Company stock and the Hembry promissory note.

The Peter Barceloux Company signed its note in lieu of H. L. Barceloux's note at the Crocker National Bank and as part of that transaction took over said securities prior to the adjudication of H. J. Barceloux, bankrupt.

Henry J. Barceloux or the Peter Barceloux Company sold these ninety-five shares of Glenn County Bank stock at the time of [166] the sale of that bank to the Bancitaly Corporation some time in January in 1927.

The $70.00 a share was not the cash consideration of this transaction and the Bancitaly Holding Company got the ninety-five shares and the Peter Barceloux Company received some stock from the Bancitaly Corporation, I think eighty-three shares.

The Peter Barceloux Company did not give H. J. Barceloux any credit on that promissory note by reason of that transaction and the note has been paid and was paid on February 9, 1927, and $8,347.68 was paid, and that was for that eighty-three shares of Transamerica.

The balance of the $16,000.00 was not paid by

(Testimony of George A. Barceloux.)

the sale of sixty-four shares of the Bank of Orland and we had to foreclose on that stock and the Peter Barceloux Company bid it in for $6,000.00, and the balance owing on the note at that time was $7,652.32. Regarding this sale, the minute-book here doesn't state $8,000.00 and at this time the $16,000.00 note has been paid in full.

My mother is eighty-five years of age. Her birthday is in March.

I do not know of any other accounts or notes receivable belonging to the corporation other than the ones you have asked about. The company hasn't any rice on hand. We did receive some rice this year from the rental of our land but it has not been sold, but the rice belongs to mother. The corporation did not harvest rice this year from its land, the tenants harvested rice from the lands of the corporation. We did receive from the tenants on lands of the Peter Barceloux Company the owners' share of the rice crop. I have the record of the number of sacks. I can get the record from the warehouse. [167]

The statement you show me, Exhibit No. 9, which purports to be a statement of bills receivable as of September 8, 1927, I couldn't say whether or not I made that statement and delivered it to the stockholders and would not be able to say unless I compared the figures. I made statements similar to that.

I had the books in my possession and nobody else had access to them and the accounts look familiar,

(Testimony of George A. Barceloux.)

but I will not say that I made it, but it looks familiar.

On December 31, 1927, I had exclusive charge of the books of the corporation and I think I have made credit statements to banks for and on behalf of the corporation to the First National at San Francisco. This statement marked Exhibit 17E in the action entitled E. J. Barceloux et al. vs. George A. Barceloux et al., purporting to be a copy of the statement, I didn't make, I know that, although it has some of the same accounts and items that we have in our books and I couldn't say whether it was a copy of a statement I made to be presented to a bank or a copy of a copy of a statement.

Prior to the time that the case of E. J. Barceloux and others against me and others was tried, I gave copies of statements to the three boys showing assets and liabilities of the corporation and this Exhibit 17A purporting to be a statement of the property of the Peter Barceloux Company was rejected, if I recall, and Mr. McGowan admitted he drew this up himself but I don't know whether I made that statement or one like it and gave it to the boys. Maybe I did. [168]

TESTIMONY OF GEORGE A. BARCELOUX, FOR DEFENDANT.

GEORGE A. BARCELOUX, having been heretofore duly sworn, testified as follows:

Direct Examination.

Examined by Mr. HUSTON, one of the attorneys

(Testimony of George A. Barceloux.)

for defendant, and Hr. Huston stated that this examination would not be strictly direct examination, but will also cover the cross-examination of the witness' previous testimony given under direct examination by Mr. Freeman.

I have been connected with the Peter Barceloux Corporation from the time of its organization and from memory the amount of surplus carried upon the books of the Peter Barceloux Company is $218,000.00 and some odd dollars and taking it from the books it is $218,388.12 as of date September 12, 1914.

There has not been anything added to the surplus account since that day and in opening the books after we formed the corporation we had to carry the different places that were turned over by father and mother at a value that we just put on them and the total of that was much greater than the capital and our capital stock is $100,000.00. The values placed upon it at that time, that is upon the assets turned over by my father and mother are: One hundred and twenty-five thousand dollars ($125,000.00) on the home ranch; eighty thousand dollars ($80,000.00) on the Longmire ranch; thirty thousand dollars ($30,000.00) on the Barceloux building; five thousand dollars ($5,000.00) on the garage; thirty-five hundred dollars ($3500.00) on what is known as the home residence; one thousand dollars ($1,000.00) on the Florenzo house; one hundred and fifty dollars ($150.00) on the North Willows lots. The bills receivable I don't know because those were carried

(Testimony of George A. Barceloux.)

from another ledger [169] into this, we changed books a few years ago. The Cartenberg Land Agreement, forty-five hundred dollars ($4500.00). The bank stock is the same thing. I can't tell because I haven't got the original ledger.

Those valuations are an arbitrary valuation and there was no appraisment of the assets and the values placed on them were made for the purpose of opening our books and just to make the book entry and according to our books the amount of our undivided profit is $35,861.24 on December 31, 1928, at the close of business last year.

In the year 1926, according to the profit and loss account, we had a loss of $1505.52. In the year 1927 we had a loss of $1799.50 and in 1928 we had a loss of $2801.99 and since its organization the corporation declared dividends once only and that was on July 1st, 1922, in the sum of $16,000.00.

At the present time we have on hand about 6,200 sacks of rice which will weigh a little less than 100 pounds to the sack and the present market value is $2.20 and in 1929 we had $5,200.00 worth of wheat and barley and about $3,000.00 from the sheep returns, that is from the wool, sheep and lambs, and the interest collections were about $400.00 or $500.-00, as shown by the books it is $375.08.

We received from dividends on stock $429.50 and the revenue from the building we collect about $2,-300.00 a year in rentals and we are getting a little return from that garage whenever we can get any cars for storage we charge fifty cents per night and I imagine the income would be around

(Testimony of George A. Barceloux.)

$400.00 a year and according to the books it is a little more—$466.00 a year, and the rentals on the building collected this year amount to $2,580.00 which includes some back earnings for last year, and the monthly rental runs about $252.00 a month when we collect it all and what I have enumerated consists of [170] all our revenue.

So far we have paid $7,631.28 for taxes and we have another assessment coming due next month of $1216.41 and the $7,631.28 includes the first installment of state and county taxes and we have paid the water charges for our rice irrigation this year amounting to $5.00 an acre or $3,000.00 and the power charges for pumping that water is $1,100.00 or $1,200.00 a year and my sister and myself receive $440.00 evenly as salary on account of the corporation, or $172.50 apiece and we paid $266.00 for insurance on the building and we paid out $250.00 on the garage and the total insurance would run about $700.00 a year.

About $190.00 was paid on the garage for repairs and all together for repairs we paid out about $1800.00 and we suffered a loss which was charged off on a note for $8,000.00 which was the Nancy Glenn Small debt—a deed of trust and we took $2,000.00. It was a $10,000.00 loan and we took $2,000.00 and were lucky to get that.

The building in Willows was constructed in 1912 or 1913 at a cost of $23,000.00 and no additions have been made to it since. Lumina Barceloux has given the corporation notice of her intention to claim her rights under that contract and she notified us first last year and again this year.

(Testimony of George A. Barceloux.)

The First National Bank of San Francisco held two notes against Henry (Barceloux), one for $6,000.00 and one for $10,000.00 and held sixty-four shares of Bank of Orland capital stock belonging to Henry and a $2,500.00 note of Hembry and his wife and eight hundred twenty-three and thirty-three hundredths shares of the capital stock of the Sacramento Valley Realty Company held as collateral for these two notes and also one hundred seven shares [171] in the Glenn County Bank and all that collateral belonged to H. J. Barceloux and it was H. J. Barceloux's individual liability.

The Peter Barceloux Company first became interested, I think, in October, 1926. Whenever the Peter Barceloux Company wanted to borrow some money we always borrowed from the Crocker National and we owed them at that time and they wanted these notes of Henry's paid so we figured, in order to keep our credit good with them, or to keep our standing good with them, at their suggestion, we bought these notes of Henry's at the First National Bank and then borrowed the sixteen thousand dollars ($16,000.00) from the First National Bank in the city and left all this collateral with them.

The H. J. Barceloux's two notes were turned over to the Peter Barceloux Company but the collateral was held by the Crocker First National Bank against the Peter Barceloux Company and the collateral subsequently disposed of and the Glenn County Savings Bank sold to the Bank of Italy.

I am mixed on this and let me correct it.

(Testimony of George A. Barceloux.)

These hundred and seven shares never did belong to Henry, that was Peter Barceloux Company stock that we took cash for, and when I testified one hundred seven shares were pledged by Henry I was mistaken and it was never pledged by Henry and that was Peter Barceloux Company stock in Glenn County Savings Bank which when they sold out we took cash for.

We made a loss of $1600.00 on the transaction and we finally sold out the balance of that stock for $1,652.32. When Mr. Freeman asked me why we did not credit H. J. Barceloux with something I don't know what he meant because we always credited him with everything he should be credited with. [172]

The Peter Barceloux home place outside of the acreage off the canal or off for the canal consists of three and a half sections of which 316 acres is east of the irrigation district canal and it is all in one body and divided with cross fences.

The land lays a mile west of the main highway running through the valley, the Pacific Highway, and there is a county road on the north side two miles and the west side two miles and the south side for one mile. The canal runs through it a little irregularly, not straight north and south, it runs a little bit to the west and leaves about one hundred sixteen acres on the east side of the canal. That land is very poor land. We never can farm it for grain only inside the canal and haven't for years. We can only raise a rice crop when we can get renters, and that we are hardly ever able to do.

(Testimony of George A. Barceloux.)

Two years ago we had about eighty acres in and that was all we could get a renter to put *it* and he had an awful time because there is seepage water from the canal and the water level is very high so you can only pick out little bits here and there. We can't get anybody to put that whole acreage in. On the west side of the canal the land is very spotted, alkali all in there. I am talking about the six hundred acres in the District.

The six hundred acres lies along the west side of the canal a mile and a half long and the water from the canal backs up and in time of harvesting that rice it made it very unhandy to get the drainage water off of it and in the winter months—a few years ago we used to raise grain on that and in the winter months the flood waters were backed up from the canal and caused a lot of it to drown out and even in harvest time the last time it was in grain it mired the harvester down from the seepage from the canal. It is poor land. [173] Very spotted. There is some good land in the ridge where the buildings and the canal for the pump is—that is a ridge and is pretty good land, about sixty acres I guess. What we call good land on top of that ridge.

During father's lifetime the 600 acres was devoted to grain and part of it we didn't farm, too much alkali, that is about 40 or 50 acres I would judge, and we summer fallowed the 600 acres to barley and as a general proposition it yielded 8 or 9 sacks of barley to the acre and that is the only production we had off the 600 acres. Sometimes

(Testimony of George A. Barceloux.)

if we got 10 sacks we would figure it was good. As to the remainder of the ranch west of the 600 acres it was dry farmed and we got crops every third year, that is farmed a third of it to grain, summer-fallowed a third and on the other third pastured sheep and on this summer-fallow basis we got from five to ten sacks of wheat and from eight to twelve sacks of barley and that portion of the home ranch has always been devoted to that kind of farming and our net revenue on sheep ran about $1500.00

The buildings on the home place were constructed in the early seventies, except the house and that was constructed in 1920 and when father constructed the buildings, he used teams in his farming and that method of farming has changed and we don't need all the buildings and we don't need one of the barns at all and the house built in 1900 has always been occupied and as to the fences some of it was built in the seventies and the balance of it in 1886 or 1887.

The Longmire ranch, that is Section 5 and 6, lies along the macadamized road to Fruto and is one mile west of the Pacific Highway that runs through the valley and the northwest half section is the part the buildings are on and is the best outside of 50 acres [174] across the east end, that is the northwest half section and it is mostly this ridge land, the best land on the place and the south half section of that place is a low adobe except about fifty acres on the east end. That land is tight. I guess you would call it Willows loam. It isn't very productive and the adobe land is a

(Testimony of George A. Barceloux.)

cold land. In wet years I have seen crops of only two sacks an acre and the northeast half section, about sixty acres of alkali land that runs kind of diagonally through the place. We never hardly raise anything at all on that, and the south half section of section Five along the south siide of that is some land I think they call Willows clay, it has a touch of alkali in it. There are about forty or fifty acres in that poor land. The east end of that half section is the best. The west end is the same kind of land as the east end of the south half section of Section Six, because they come together there. It is that type of land that don't produce very much.

What I term the good land is the ridge land about 270 acres out of the whole section and I mean the two sections and no part of the Longmire ranch is under irrigation and there are some old buildings on the Longmire ranch which are in very bad shape. The Longmire ranch is farmed on the same basis as the other about a third a year and we have some sheep on there and some years we have three hundred acres in and in other years we have five hundred acres, and the ranch is divided into three equal fields, and the other ranch is not divided into three equal fields, and that makes it easier to have the same acreage in.

The Longmire place is divided into three equal fields and we try to keep some feed for the sheep by not plowing it all up. Some years we might have five hundred acres in and some years three hundred and the grain production is about like the

(Testimony of George A. Barceloux.)

other one, and [175] last year we got three sacks of wheat on that half section next to town, and the south half of section five got an average of three sacks of wheat, and that does not pay. The idea of alternating every third year is to use the sheep for fertilizing, and the land has got non-productive, that is from farming a long time, and that is how we get by with the balance of our means, the building and the little money we loaned out, and otherwise we wouldn't be having this trouble now, we would let it go for taxes, and were it not for other revenue it would be impossible to pay our taxes.

This land has been farmed in this manner since 1870, with the exception of the years it has been planted to rice, and this rice land I might say on the west side of the canal we are under the problem of not getting a renter, and they don't want to be bothered with that pump and with not getting the drainage water away on account of the canal, and also the seepage from the canal, and it is very hard to get renters, and the water with the booster pump is lifted eight feet, I guess, and costs outside of depreciation three dollars an acre.

We have had five crops of rice on that place since we put that in, of which two have been profitable to our tenants and ourself, that is for the years that they were put in, but if you take the years they were laying idle the carrying charge of that land while idle of course did not pay, and we have not been able to get the same tenant to farm the

(Testimony of George A. Barceloux.)

rice land on the home place for more than one year, except the first year we put it in. [176]

Cross-examination.

(By Mr. FREEMAN.)

The first year we had that land in rice that is the home place, I think was the year that Guey Jones farmed it in the year 1921, and at that time he had it under lease, and had nothing to do with the farming of it this year, but Wah Kee, another Chinaman did, and Wah Kee had it just this year. It was not farmed last year, but it was farmed the year before that by Neelson and my two nephews. It has not been farmed every year we wanted it farmed, and we have tried to lease it and tried to get a tenant and it is not true we couldn't lease because we wanted the tenants to pay the pumping charges, and we wouldn't have Hindus on the place because we don't believe they are desirable tenants, and there was one Hindu here that had a white wife downtown and he wanted to rent it and put it in his wife's name and we wouldn't have anything to do with it because we were dickering with Wah Kee and we leased to Wah Kee. I never had any negotiations with Shur Singh an American citizen and since 1921 about six hundred acres has been in crop five different times, and we got the usual rental of one-third of the crop, and as far as I know we had since I am handling it, and I farmed a part of the land all west of the canal on the home place from April 6th, 1877, until September 25th, 1907, prior to the time of the formation of the cor-

(Testimony of George A. Barceloux.)

poration, and during the time I was farming that land my father never tried to sell it.

Prior to the formation of the corporation, father and Henry farmed the Longmire place a while and also Paul Paquette, and during that time father did not try to sell it, and after the organization of the corporation, the corporation did not endeavor to sell the land, and at one time the corporation gave an option on all the land and [177] Page fixed the price the option price on the land at that time, and he said if we would give him an option he though he could sell it at that price, but I did not make a price, he made that statement, and at that time I did not make a statement to him that I would take less money than the option price, and I was not interested at all because I figured we couldn't sell it, but we would have sold at that price provided mother would have agreed to it. I do not remember what the price was.

The option price as shown by the minutes of the Board of Directors on September 25th, 1926, for the home place and the Longmire place was three hundred fifty seven thousand five hundred dollars, but the option was never renewed, but I never had any personal knowledge of the project of Mr. Page at that time. I had a discussion with Page about it on the lines as stipulated in the option, and mother said "if they are foolish enough to pay that amount of course I will let it go." I think we consulted with her prior to September 25th, 1926, and our reason for consulting with my mother was,

(Testimony of George A. Barceloux.)

she had full say about this property, and we have consulted with mother in reference to all the actions by the Board of Directors of the Peter Barceloux Company from the time of the agreement of July, 1912, up to 1926, and up to to-day, and she is familiar with everything, and have taken no action in matters like that without her consent but of course in minor things where we had to act immediately we went ahead and acted and then informed her of it.

"Q. Your mother had knowledge and gave her consent to all matters generally done by the Board of Directors of the corporation in 1926?

A. She knew what was going on and didn't object. [178]

Q. Did she give her consent?

A. She did by not objecting, yes."

At the time we opened the books of the Peter Barceloux Company, the valuation of two hundred eighteen thousand surplus was put on the property by my father, Gelinas, Henry and myself, and at that time in 1914, Paul Pauquette was farming the Longmire ranch and his brother was on the home ranch, and at that time the ranches might have been a little more productive than they are now.

At the time we opened the books we carried the Cartenberg agreement at forty-five hundred dollars and we now carry the Cartenberg agreement on our books at twenty-seven hundred dollars. The difference between those two amounts we made on the sale when we sold this particular stock that you

(Testimony of George A. Barceloux.)

are contending about now, and when we sold that out we figured there was eighteen hundred dollars coming and we figured it in that transaction and credited to this account, I mean on the pledge sale.

In July, 1926, the corporation owned one hundred and seven shares of Glenn County Savings Bank and on the 16th day of August, 1926, that was one of them and seventy-five shares of Bank of Orland, and thirty-five shares of United Bank and Trust Company.

The thirty-five shares of United Bank and Trust Company had no connection with the stock H. J. Barceloux owned in that corporation, and the corporation owned no other stock and did not own any Liberty Bonds at that time.

Subsequent to the 16th day of August, 1926, the corporation owned two thousand four hundred ninety-nine shares of Peter Barceloux Company stock, one hundred (100) shares of the Glenn County Garage, seventy-five (75) shares of Pacific National Fire Insurance, and nine shares of Bank of Orland, and then later on sixty-four (64) shares of [179] Bank of Orland and eight hundred twenty-three and thirty-three hundredths (823.33) shares of Sacramento Valley Realty Company, and since that time on September 7, 1929, we have acquired twenty-four (24) shares of Intercoast stock, and we had a right to purchase it at Seventeen and a half ($17.50) twenty-four shares, and the sixty-four (64) shares I mention of the Bank of Orland stock was collateral to those two notes of Henry's

(Testimony of George A. Barceloux.)

that we bought from the Crocker First National, and when we took up the notes of Henry at the Crocker First National Henry did not make and deliver new notes to us, and we merely bought the old notes from the bank. The bank (Crocker) transferred the Glenn County stock into the Bancitaly Corporation at seventy dollars ($70.00) a share, and the Crocker Bank sold that and gave us credit on Peter Barceloux Company notes that they held and we credited Henry Barceloux's notes that we held. On August 16th, 1926, the Peter Barceloux Company was indebted to the Crocker National I think in the sum of fourteen hundred dollars.

The Crocker First National wanted us to take that off their hands and we did it because we wanted to keep on good terms with the Bank because whenever we wanted to borrow money, we always borrowed it from them.

In September, 1926, we borrowed sixteen thousand from the Crocker First National and gave the Peter Barceloux Company note and the Crocker Bank assigned Henry's two notes to us, and whether it was with Henry's consent I cannot say. Henry was not with us, and I don't remember him being there when I was there.

When the Peter Barceloux Company gave its note to the Crocker National Bank for sixteen thousand dollars ($16,000.00) the Crocker First National Bank did not turn over to me all the collateral they held for H. J. Barceloux, but they held it down there, and as [180] they sold it, they

(Testimony of George A. Barceloux.)

credited us something on our note and we in turn credited Henry's note to us, and for our sixteen thousand dollar note we got Henry's sixteen thousand dollar note, and I suppose Henry got those notes.

"Q. When did you give them to him?

A. When they sold him out I suppose. Tim had the care of it (i. e., Mr. Belieu).

Q. You say 'when they sold him'—

A. When we sold Henry out for the balance he owed."

The minutes show that the sale was made on June 20th, 1927, and that we sold sixty-four shares of Bank of Orland, 823.33 of Sacramento Valley Realty Company stock and the Hembry note for twenty-five hundred dollars, and that was not all the collateral, that the Crocker Bank had, and the reason we owned part of the collateral and not the balance was we paid off our note there on February 24, 1927, and as soon as we paid off they gave us the balance of the collateral that they had, and we didn't leave the collateral there on February 24th, 1927, and when we paid the Bank they turned over the three remaining items.

At the time the Crocker First National Bank sold the Glenn County Bank stock that was up as collateral we were given a credit of eight thousand three hundred forty-seven dollars and sixty-eight cents on our note, and our books show that there remained due from H. J. Barceloux to the corporation on that Crocker Bank transaction seven thou-

(Testimony of George A. Barceloux.)

sand six hundred and fifty-two dollars and thirty-two cents.

When we sold in June, 1927, the sixty-four shares of Bank of Orland, eight thirty-three shares of the Sacramento Valley Realty Company and the Hembry note, that cleared up the balance of [181] $7,652.00 as far as the note was concerned.

It didn't sell for the full amount but as far as the transactions in the books is concerned that liquidated the debt due and he was entitled to his notes back which I presume he got.

The Peter Barceloux Company made the sale at that time and it bid $6,000.00 and it bought it in and the balance of $1662.00 that Henry Barceloux owed was charged to profit and loss and as to what is going to be done with the $55.00 workout on the shares of stock on the Glenn County Bank that he owned I don't know and I suppose it will go to the person owning the stock and I just told you the Peter Barceloux Company had that stock and the Peter Barceloux Company will claim the $55.00 holdback on that stock.

If you borrow money from the bank, if you have the security and then pay them off you don't have to leave it there. You can take the cash from some other source and they will hand you back the security and they can't come back and demand more money on that, they are paid off.

The shares of stock of the Glenn County Bank that were up as collateral were sold by the Crocker First National Bank to stock-brokers on the market.

(Testimony of George A. Barceloux.)

The Peter Barceloux Company bought in the stock sold under the pledged sale and we got the figure of $6,000.00 the bid in price because at that time we figured that was all it was worth.

If the minutes of July 12, 1928, show that the company bid the stock in for $8,571.66 in full satisfaction of the debt it could not have been bid in for that, it might have been with the interest.

I am reading from the book which shows the amount bid was $6,000.00 and the balance due on the principal of those notes, there were two of them—was charged to profit and loss, which was sixteen [182] hundred thirty-two something—whatever it was. It might be that those minutes read that he owed interest and all up to that time was eight thousand dollars and something, but he didn't owe that much on the principal so it couldn't be that amount. I don't think we have any document from the Bank of Italy showing that the Peter Barceloux Company claims this $55.00 holdback shares on the Glenn County Bank that were up as collateral at the Crocker Bank and we made claim that that stock was up as collateral and automatically that workout goes with that stock and you cannot separate it, cannot segregate it unless you get an order and serve it on the bank. It automatically goes with that stock, so when we serve them notice we are owner of that stock, that is sufficient. If there is anything coming from that workout we expect to get it.

(Testimony of George A. Barceloux.)

The corporation owns 650 sheep I think and in July, 1926, we had fewer sheep than we now have and we naturally kept up the herd, substituted the young ones for the old ones and I imagine half of the 650 are old sheep and just how old they are I cannot tell.

The renters of the Barceloux Building pay as follows: Tim Belieu pays $20.00 a month, when he pays. Dr. Deacon pays $20.00; Dr. Lawson pays $28.50; Sister pays $60.00; Litster pays $85.00; DeGaa pays $36.00.

I asked my mother how old she was and she stated eighty-five. She was born on March 7, 1844.

The place described in our books as the rice camp that is some buildings on that part of the land planted to rice of the home place and the value of the buildings is about $150.00 or $125.00 and the machine referred to is that Booster Pump. I don't know what that machinery cost originally and we carried those things in our books at $8,421.51 and that machinery account in the books of August, 1926, [183] August 16th is $2,002.42 and there was some depreciation on that motor and stuff.

(The answer of defendant was introduced as Plaintiff's Exhibit No. 13.)

Redirect Examination.

(By Mr. HUSTON.)

When we rented the land for one-third of the crop the renter paid the water charge, but we have since been paying it—oh—the water charge? We always

(Testimony of George A. Barceloux.)

paid it. The land owner pays the water charges and we furnish the equipment and pay for the juice. Some renters a time back paid the juice but we paid the $5.00 an acre charge and furnished the equipment and paid all the taxes and sometimes we paid for all the juice.

With reference to the option that has been mentioned here, that was one of these pipe dreams of the real estate people and he had some Holland people and he was going to put up a big colonization scheme and he set a price and we accepted it. On this building here the city taxes are $230.75 and county taxes $443.20 which I figured out by taking the assessed valuation and multiplied by the rate and the rate is $2.77 and the insurance on the building is $266.70 a year. We have been pretty lucky concerning the repair and haven't paid very much on that and some repairs and some lights. We furnished the water and the light in the hall and the janitor and the water and light amounts to about $42.00 a year and the janitor $120.00 a year and so far we have paid out $170.00 for repairs this year and I think it will average better than $120.00 a year for maintenance. We paid cash on our street assessments. [184]

(In answer to questions propounded by the Master, the witness testified as follows):

The policy of insurance on the building was just for one year and one year we borrowed on the home place on three and one-half sections there approximately 2,200 acres, $50,000.00 and they

(Testimony of George A. Barceloux.)

wouldn't lend it to us unless we paid $2,500.00 every six months on the principal and we couldn't get the money from the bank and we borrowed it from a Life Insurance Company and the life insurance was not connected with the loan in any way, not any more than I carried life insurance with the company and I think the loan was paid off in nine months, but it was not paid off out of the production of the ranch.

These books were opened January 4, 1914, and the balances were brought forward from another ledger and where that other ledger is I don't know, and Mr. Freeman attached my brother's safe in which my brother had a lot of papers and in fact some papers that we needed in the Cartenberg land suit and I don't know where they are, but let me explain a little further. The books were opened about the time of the organization of the corporation and the old books were changed around in 1921. A lot of these dates are not of the date of the transfer of the old books—I don't know why they put them in. I didn't make the transfer or I could explain it. They seem to have stuck some of the old dates on the entries which they shouldn't have done. They should have been made from the date of the actual transfer. Some are dated way back and some are not. But the transfer of the books was around along after 1920.

The one hundred and seven shares of Glenn County Bank they got that stock when they organnized the Glenn County Bank and that [185] included seventy-five shares of the Bank of Orland

(Testimony of George A. Barceloux.)

and also the original stock of the Fort Sutter National Bank of Sacramento, thirty-five shares and later on we paid three hundred and fifty on the thirty-five shares in October, 1924, a cash purchase of thirty-five shares, Sacramento-San Joaquin, and I think that is what they paid for those and later on they were transferred for the other bank stock and to get the rights they had to pay them an additional $350.00 to get the eleven and two-thirds and whatever number of shares they had in the original Fort Sutter Bank they were entitled to eleven and two-thirds rights by paying $350.00 more which they did and they said, "You turn in your rights and certificates and we will give you so many shares."

The thirty-five shares and participating certificate for eleven and two-thirds cost us $350.00 and that was a participating certificate which carried no dividend and we have thirty-five shares of United Bank & Trust Company plus eleven and two-thirds rights.

Redirect Examination.

(By Mr. HUSTON.)

As to the sheep the 650 head the Peter Barceloux Company is a half owner only and the renter owns the other half and the renter on the Longmire ranch is Elmer Barceloux and he owns half of the sheep and the name of the tenant on the home ranch is George St. Lewis and we have the same arrangement with him.

(Testimony of George A. Barceloux.)

Recross-examination.

(By Mr. FREEMAN.)

The arrangement about the sheep has been in effect since [186] we have had sheep on the ranches and the renter and the company bought the sheep together.

I don't think I made any statement to the stockholders in January and the item of $4,619.50 represents our interest in the sheep account but it does not show the number of sheep on hand and this item has been carried in this way since the 15th of May, 1922, and represents what we originally invested in the sheep less certain adjustments and there is an account here of a credit of $750.00 for sheep that died. The date of that entry is December 31, 1920, and as late as 1929 we carried the sheep item as a value $4,619.50 that is after the deduction of the loss of seventy-five. The renters handle the sheep and when it comes to selling lambs if they want to contract to sell they generally take it up with the company, my sister or myself and see if the price is agreeable and they generally dispose of the old ones when they can and replace them by ones they raise. I have never made a count of the sheep and when I figured six hundred and fifty it is from knowledge I get from asking the renter. In October of this year is the last time I got an estimate as to the number of sheep they had.

Our books show where we have purchased bucks

(Testimony of Charles F. Lambert.)

on August 11, 1920, for $60.00, but the books do not show any purchase of sheep since January 1, 1926.

(It was determined that the Master and the attorneys should visit the home and Longmire ranches for the purpose of viewing them and that a count should be made of the sheep.) [187]

TESTIMONY OF CHARLES F. LAMBERT, FOR DEFENDANT.

CHARLES F. LAMBERT, after being duly sworn, testified as follows:

Direct Examination.

(Examined by Mr. HUSTON, One of the Attorneys for Defendant.)

My name is Charles F. Lambert and I am a resident of Willows and have been such resident since 1907 and I have been engaged in irrigation, real estate, colonization and land development enterprises. I have owned land and operated it under irrigation and have organized irrigation districts and managed and operated them and I could say that I have had very complete experience in irrigation. I was the organization agent for the Glenn Colusa Irrigation District and was secretary-manager from its date of organization until late in 1923 and I can tell you generally the area of land included in the Glenn Colusa District.

It had the area of land of the old Central Irrigation District or the lands that were originally under

(Testimony of Charles F. Lambert.)

the system of the old Central Irrigation Company and in Glenn and Colusa Counties, the district originally contained 103,000 acres, the majority of which was in Glenn County and now contains about 126 acres and it is entirely in Glenn and Colusa Counties.

I am not directly at the present time handling lands for sale. I have had something to do with the marketing and sale of lands at other places in Sacramento Valley and by other places I mean outside of Glenn County and for the last three years I can't say that we sold land, we had been trying to keep the land that we had sold in operating condition in Sutter County, lands of the Alameda Sugar Company. [188]

We were dealing with land under Reclamation District No. 70 along the Sacramento River comprising 11,600 acres in that tract and it is the best type of Valley land that we have in the overflow basin of the Sacramento River and part of them in other days was a tule land and known as Sacramento River silt soil and that land is under reclamation at the present time.

In early days I sold large areas of lands in Glenn County and Colusa County, that is when colonization was under way and I am intimately acquainted with the lands in Glenn Colusa Irrigation District and I know every tract of land in it and have been generally familiar with it during my early operations here from 1908 to 1916, and over that period of time as far as I have been able to, have kept myself informed as to land sales.

(Testimony of Charles F. Lambert.)

In the fall of 1920 there was a very decided break in values and that break has been continuous since 1920. That is, we have had what we call a declining land market for land values.

Prior to 1920 and during the war this country around here became known as a rice area, that is those areas of land that had water for irrigation and rice was a very profitable crop and land values followed the profits of the rice crop and in 1920 the break in all commodity prices occurred and the break in land values followed the break in commodity prices and in 1921 the break became more apparent and in 1922 it continued in a downward trend and I would say that each year a realization of lower values has been more apparent.

The break in the market condition affected the lands devoted to grain, barley and wheat and rice lands and it affected all lands even lands devoted to alfalfa. [189]

The history of the land situation in the Glenn Colusa Irrigation District since 1920 with reference to lands going back to the District for nonpayment of taxes is, the first assessment year is 1921—for a period of one year and one-half because of the fact that the district was organized between or rather subsequent to the 1st of March, 1920, and practically a year and a half bond interest and principal was due and that forced the first assessment of the Glenn Colusa District to be an exceedingly heavy one and a considerable area of inferior land, meaning rice land, that contains a heavy

(Testimony of Charles F. Lambert.)

quantity of alkali, approximately 6,500 acres went into default on the first assessment.

I might say that those lands were lands that were not strongly handled and that is, in the hands of strong people and the lands of the same type that were in the hands of strong people paid their assessments and the following year very few delinquencies occurred in area.

I might say for the information of the Court that the sale of the lands of the irrigation district does not mature until final sale at a three-year period after the date of original sale, or at the time I mentioned in 1920, 1921 and 1922 the irrigation laws provided for the final sale to the district after a period of five years and in 1925, the law was changed making it from the five-year period to a three-year period so final sale occurred to the district by deed in the year 1927 because of the fact there was a five-year period for the first interest.

That followed that procedure until the new change in law became effective until now the period is for three years and with a few exceptions this land that went delinquent and has finally become the property of the district was of the rice land type containing [190] alkali and heavy clay, and there are small areas of land of very good type of the best type in the area that has been sold to the district, and shows now in their record.

I am familiar with the organization of Reclamation District No. 2047 which was organized in the fall of 1919 just prior to the Glenn Colusa and

(Testimony of Charles F. Lambert.)

includes all the area of the Glenn Colusa District except later additions and accretions by inclusion at a later time.

As to the indebtedness created by that district, the rice land area was around $17.00 an acre and there may be exceptions in the rice land and running as high as $14.00 in the higher types of soil and the bonded indebtedness of the Glenn Colusa Irrigation District per acre at this time is approximately $14.40 per acre and has changed since August, 1926, by reductions of the principal payment on the bond and it reduces each year, and in 1926 the bonded indebtedness per acre must have been about $15.50 if it is $14.40 now.

Since 1920 there have been quite a number of foreclosures in agricultural lands in Glenn County. However, there have been I would say more transfers by pleasure of the banks and loan company than by legal procedure, and I mean transfers in satisfaction of the debt and there has been quite a number of those transactions and the cause is that the farmers haven't met the charges against them and he didn't have enough spread between the cost of production and income from his property on all kinds of land.

I am familiar with the lands of Peter Barceloux Company, the home place and the Longmire place and generally I have known them since 1908.

The home ranch up and until the organization of the Glenn Colusa District was a dry farming property, growing wheat and barley [191] and after

(Testimony of Charles F. Lambert.)

the organization of the district the Barceloux included a portion of their property within the boundaries of the district and since that time the land has been devoted to the growing of rice, that portion under irrigation, and it was included in the district at the time of its organization.

"Q. How many years was it devoted to rice?

A. I am testifying from that report I made up, not from memory. Just exactly what years was information that I obtained from the tenants."

I have at the request of Mr. Belieu made an investigation of these lands and their production which was made by inquiry from tenants as to the crop production and the number of acres farmed for the last five years. The land in the home place varies in types of soil, and the easterly portion, I can't recall the section number, if you want that, the eastern portion of the home ranch lying adjacent to the Glenn Colusa canal, and a small portion joining the canal on the west, is a type of soil the Government soil engineers, in their survey of this Colusa area in 1907, classify as Willows clay. That type of soil contains a varying percentage of alkali. The alkali map covering that particular land shows a range of from three-tenths to six-tenths of one per cent alkali. The area of Willows clay is approximately between three hundred and twenty, and three hundred and sixty acres. The land could be adapted for rice growing and pasturage either with or without water, and the remaining portion is divided into two soil classifications, Willows clay adobe and Willows clay loam,

(Testimony of Charles F. Lambert.)

about an equal division I would say. The Willows clay loam means a better type of soil, in fact the best type of soil that we have in this area, and it is a friable loam and holds moisture well under proper farming conditions and produces the best [192] crops, and the adobe soil while it is a fertile soil has a more compact subsoil and the surface soil is not retentive of moisture and it cracks open and loses its moisture very quickly.

Wheat and barley have been grown on the home ranch, and rice is the only crop I know of having been grown in the irrigated portions. That portion of the home ranch east of the canal is not the only portion of the home place that has been devoted to the cultivation of rice, and there is more land than that. Some of the Willows clay loam and Willows clay adobe also. There is an area of some nine hundred acres of the home place in the Glenn Colusa District and that is the area devoted to the cultivation of rice. With reference to the grain land and farming operations and character of crop, well generally and in this instance, since I have known the Barceloux property it has always been what is known as summer-fallow land. That has been the general practice in this community since my residence here and my knowledge of it, the land is grown in a crop one year and summer-fallowed and allowed to rest and lay idle and farmed the second year. During recent years that practice has been found not the best and in the case of the Barceloux' and in the case of many of

(Testimony of Charles F. Lambert.)

our best farmers, it has been found profitable and considered a better practice and better farming to pasture the land for one year, allowing the burr clover and legumes natural to this territory to grow and plow and plant it the third year. You might say that is the universal system now. That is perhaps brought about by change in pasture value, to some extent.

With reference to the Longmire ranch, there is only a small portion of Willows clay approximately forty acres in the south portion of the east section adjoining the Willows-Fruto road, and [193] it is dry land and apparently an alkali condition caused by poor drainage, and is that part of the ranch of the south portion of the east section adjoining the Willows-Fruto road consisting of forty acres.

The ranch as a whole with reference to its type of soil and its diversity is, the balance of the land is a Willows clay loam type, and there are some varying conditions of minor importance, but that particular land is comparable to lands lying in the same elevation throughout that entire area, but the Longmire property lays at a lower elevation and suffers from adverse drainage conditions and during heavy winter rains some of the crop water kills, and the land is rather flat in contour and none of the land of the Longmire ranch has been irrigated, and barley and wheat are the only crops I have ever known and the farming method is exactly similar to the method on the home place, viz.: sum-

(Testimony of Charles F. Lambert.)

mer-fallow when I first knew the property, in alternate years and then summer-fallowing, pasturing and plowing every third year period in later years. I will say I have seen probably sixteen sacks of barley grown on that property. I couldn't testify as to the exact number of bags per acre, and I have seen crops hardly worth the cost of harvesting, so I would say, to hit an average, in terms we use in speaking of farm lands, that it would be considered an average twelve-sack land, but that is more or less of a guess.

In a normal year of rainfall and weather conditions I would expect from a summer-fallow crop on the Longmire ranch sixteen to eighteen sacks, and years like 1920 and 1924, it probably wouldn't pay the harvest.

The home place is not as productive a property as the Longmire in my opinion and the home place is a clay adobe and varies [194] four to six sacks per acre in production as compared to the loam soil. The soil classification by the United States Bureau of Soils in 1907, namely "Willows Clay, with alkali content of from three tenths to six tenth of one per cent. This soil is typically yellowish brown in color, very compact, impervious, tenacious, puddles when wet and bakes hard and checks when dry. This soil often extends to a depth of six feet or more. The analysis shows approximately forty-eight per cent silt and forty per cent clay, the balance twelve per cent is distributed among the various types of sand." "Willows Clay adobe soil is typically a chocolate brown clay with an adobe

(Testimony of Charles F. Lambert.)

structure, and is usually about three feet in depth, the soil below this depth becomes a light brown or yellowish brown or yellow clay. When wet it becomes exceedingly sticky and puddles easily, upon drying it exhibits a typical adobe structure, the soil cracking and checking until it is reduced to a granulated mass. Both soil and sub-soil have a high water holding capacity and is known as the best type of land for the growing of rice."

"Willows Clay loam is a chocolate brown clay loam, fairly friable when properly cultivated but inclined to be compact when not. This type averages about thirty-six inches in depth to where it grades into a lighter brown sub-soil of clay texture."

The description of those soils as set forth in this report is what I have referred to in my testimony and one observation of my own as to clay adobe type, that is best for rice.

From my investigations with tenants on the Barceloux property I have ascertained the history of the crop production for the years 1925, 1926, 1927, and 1929, and have tabulated that list in typewritten form, and for the purpose of reaching a conclusion with reference to production costs from 1925 to 1929, inclusive, [195] covering barley, wheat and rice I have made some figures.

I have known of all the lands that were sold in the neighborhood of the Barceloux property, but I cannot tell you the price they were sold for, and I know what lands where sold in a radius of five miles from the Barecloux property and when you

(Testimony of Charles F. Lambert.)

ask for the market value of the Peter Barceloux Home place on the 16th day of August, 1926, considering the purposes to which it has been adapted or to which it could be reasonably adapted and what it could have been sold for in the open market for cash in a lump sum or per acre and since your question is for the whole property including the improvements and everything and there are three types of soil I will have to do a little figuring to get at it. On the basis of 2,185.88 acres it is my opinion that the property has a value based on a price per acre of the several kinds of land whether in Glenn Colusa District, what portion in Glenn Colusa and what was in 2,047, is seventy-three thousand six hundred thirty-five dollars and 70/100 and the different figures are, three hundred and twenty acres under gravity flow from the Glenn Colusa District, at twenty dollars an acre, that's sixty-four hundred dollars. The balance of the area under the Glenn Colusa Irrigration District under lift pumps, approximately $615.70, at fifteen dollars an acre. The balance—an area of twelve hundred and fifty acres which is the dry farm lands, at forty dollars an acre, and the value of the improvements eight thousand dollars.

My reason for making the difference in valuation with reference to the gravity flow land and the lift pump lands is, in valuing that land in the irrigation district there is a continuous cost of operation for power charges and maintenance and it is expensive to lift the water with pumps making a differentiation [196] there of five dollars an acre, and my

(Testimony of Charles F. Lambert.)

reason for placing my valuation on the irrigated land is based upon the same type of soil comparable with that purchased at that valuation. You direct my attention to the Longmire ranch and what in my opinion the market value of that land was on the 16th day of August, 1926, if offered in the market for sale for cash taking into consideration the duties or purposes to which it has been or could be adapted and including the improvements thereon on 1,240.7 acres, and it is my opinion the value of the Longmire property is sixty-four thousand three hundred forty-two and 50/100 dollars and my reasons for reaching that conclusion is twelve hundred acres at fifth dollars an acre, $60,000.00 and forty acres at twenty dollars an acre, $800.00 and value of improvements $4,450.00 or a total of $65,250.00 and then I have a deduction of eighteen and fifteen-hundredths acres, at fifth dollars an acre. This deduction of eighteen and fifteen-hundredths acres is based on excess area given to county roads. Longmire property has a waste area of five miles of county roads, there being a county road entirely surrounding the property and property lines and areas are calculated to the center of the county road, and the assumption is made on those two sections that ordinarily there would only be a road on one side of the property ($65,250.00—$907.50 for county roads—$64,342.50.

Cross-examination.

(By Mr. FREEMAN.)

The road runs on all four sides of the Longmire

(Testimony of Charles F. Lambert.)

property and the part on the south is a paved highway and at arriving at all values I took into consideration the proximity of the land to the town of Willows and the sale of adjoining lands of the same type within the last few years and at the prices for which they were sold. [197]

I took into consideration the sale made to Lederer of the Devenpeck property and the sale made to the Feeneys and I heard that the Devenpeck property was sold and I was told that it sold for $100.00 an acre and the Devenpeck property is infinitely better property than the Longmire in that part of it is under irrigation and it has a contour of about four feet more to the mile and has no flat areas that inundate by winter rains.

I have not been over the Devenpeck property to determine those points and my general knowledge and study of the contour map I determined those points and I estimate that sixty acres of the Devenpeck property is now irrigated. The sixty acres under irrigation of the Devenpeck land and the balance of the land not irrigated compares as follows: I say it is infinitely better soil caused by its location. It lies closer to the overflow of Willow Creek. Those properties are all built up by accretions—deposits by the overflow of the foothill streams. The best type of land we have in this vicinity are the loam types. While we type these soils under a general name, they vary according to their location. There is an elongated, narrow strip on the south side of the stream channels through the valley that has been built up by successive years

(Testimony of Charles F. Lambert.)

of overflow from these stream channels. The property that Mr. Freeman asked about, the Devenpeck property, lies west of the Barceloux property and was in the direct line of the overflow during past years. It does not overflow now at this time, but Willow Creek formation has proven by its old stream channels, probably within the time of man in this country, it overflowed and built up those areas. As you get farther away from a stream, from where a stream debauched from its channel, you come into this other soil. The soil is inclined to puddle—they are of finer structure, while soils closer to the [198] streams are more friable, easier to work and more retentive of moisture. If they were subject to irrigation they would be productive of more crops that in the lower type you would not produce.

The Devenpeck land that is the sixty acres thereof is adapted at this time to growing grain. I haven't paid any attention to crops produced on the Devenpeck land. I have had knowledge of what crops are planted and produced only in a general way, except that Lederer in my conversations with him as we talked, as we do talk to farmers as we come in contact with them, has had much better crops than his neighbors. Better crops than the Boyds.

I only know of two farming operations of Lederer and both are the same type of soil and that is the reason he bought, he told me, because it was exactly like the property he owns up on the old creek which is his old home place. The difference in value of the land of the Devenpeck place and the

(Testimony of Charles F. Lambert.)

land in the Longmire place, I would say the Devenpeck place would be worth sixty to sixty-five dollars an acre and ten or fifteen dollars more than the valuation put on the Longmire place, as I value the Longmire property at fifty and that is on account of the greater productivity.

I would not say my valuations have to a great extent been fixed by production records from tenants and I would say that the tenant's records and the crop production records in making appraisals of any property are only valuable so far as they throw information and light upon the income that may be of value in fixing any valuation. I will say that any valuation fixed upon the present declining market of real estate anywhere, not only in California but any other part of the United States to-day, cannot be based upon production records. I don't know exactly how to [199] express my opinion. I doubt whether farm lands have any known value to-day anywhere.

My reason for getting those figures from the tenants and the cost of farming operations over a period of five years was merely for historical value it may be to anyone not cognizant with agricultural values, productions, markets and costs and this particular record was made for appraisal purposes at the request of Mr. Belieu, attorney for the defendants in this suit.

What I have made is in the nature of an appraisal. I do appraisal work for banks and have done so in the past and for any appraisal I ever made I take into consideration the production value

(Testimony of Charles F. Lambert.)

of the property, also the cost of operation of the particular lands. In this case in fixing the value had I taken into consideration the production value of the property and also the cost of operation I would have had to put a much lower value on it and I will confess that I put a speculative value on it and my appraisal is based on the general assumption that someone could have been found having enough confidence in the future of agriculture that if this property was offered for sale they would consider it a fair and acceptable price to purchase it at.

If I had a client looking for a piece of farming land adaptable to the growing of wheat and barley and not in the irrigation district I would first lay the foundation of what we hope is going to come out of the tariff to make it pleasing to him and to suggest the property was worthy of his investigation, and I would be very frank with him and show him all the facts and advise him and by speculation I meant whether there is going to be a lowering of the cost of farming operations coupled with increased selling value of crops and with favorable years and the friendliness of God Almighty. [200]

I have heard that Lederer paid one hundred dollars an acre for the Devenpeck place and I consider him a good farmer and I know he studies the land he buys for the raising of wheat and barley and when he bought this place it was for the purpose of raising the same kind of crops raised on the Longmire and Barceloux property.

I can't say the market value in my opinion on either of these properties in any extent fluctuated

(Testimony of Charles F. Lambert.)

since August 16, 1926, either the home place or the Longmire ranch and they certainly have not gone up any since 1926 and to be a fluctuation there has to be a rise and fall and I would say they have not fluctuated.

"Q. Your opinion being based upon speculation, to some extent, would it change your opinion any if you knew that in the year 1926 there was some discussion about bringing water from the Glenn-Colusa District and putting it on the west side of this valley over by the Longmire and home places and at that time the Barceloux family put a hundred dollar valuation on their own lands on that option?

A. Nothing the Barceloux' would say about the value of their property would change my opinion of it.

Q. Looking at it from a speculative basis, fixing the market value on what the land would bring, there being a willing seller and a willing buyer—

A. Do I understand you want my opinion of the lands, if it was all under irrigation?

Q. No, I didn't ask you that. I asked you if it would change your opinion as to that value if the lands, based upon the elements contained in the question asked by Mr. Houston, a person willing to sell and not forced to sell, to a person willing to buy and not forced to buy, with a reasonable [201] opportunity on the part of the seller to find a buyer, if that price of one hundred dollars an acre was put on the land straight through by the Barceloux family in the month of September, 1926?

(Testimony of Charles F. Lambert.)

A. You lawyers, both you and Mr. Houston, are good at asking long and complicated questions. You want to know if anything the Barceloux' said in 1926 changed my idea in values?

Q. Yes? A. Not a bit.

Q. Would you say the land has a greater or less value by reason of the fact it is included in the Irrigation District?

A. Depending upon the land. If it is a general question I would say it has an increased value if the land is of a type that will assure the production of profitable crops, as we know them to be."

When you ask me whether rice has been a profitable crop on some land in Glenn County I would say it would show a very small return on the money and maybe one per cent on the better type of land, net, if you mean to take into consideration all the factors, paying of taxes and everything.

I fixed the value of fifteen dollars an acre on approximately six hundred and fifteen acres of the Barceloux property, the home place that is included in the irrigation district and I fixed the value at twenty dollars an acre on three hundred and twenty acres included in the irrigation district and there is a difference in soil type between these two parcels of land and the area at fifteen dollars an acre is a better type of soil than the twenty dollars an acre and I divided those two pieces by the canal and there [202] is a small portion of Willows clay area west of the canal, but the question in your mind is—why did I say the better type of soil has a lower value. The Glenn-Colusa Canal was con-

(Testimony of Charles F. Lambert.)

structed through this area many years ago early in the nineties. It acted as a natural barier to flood waters and run-off waters of the winter. To a certain extent the land became water killed more or less. Water killing brings up alkali lying below the surface. Where you find a large body of Willows clay land grading off into another type of soil you find it usually grading into Willows clay adobe type. Immediately adjacent to the Willows clay type containing alkali, you find the same structure but with some difference in color, but so far as productivity is concerned you have about the same structure, so in so far as the lands of Barceloux and Company are concerned they are inherently the same type with the exception of the Willows clay type with its proven alkali content. Under irrigation, also, the Barceloux company did not provide themselves with the proper drainage and rice cultivation in 1920 for a period of time caused a rising of the salt condition, the canal acting as a barrier and not allowing the water to flow off, and it is my opinion that the Barceloux home place is of approximately equal value to the Willows clay adobe type, speaking now of the lands within the Glenn-Colusa District. However, there is a difference in the value of lands from the standpoint of net income. That is a consideration. The portion lying below the canal would have a valuation for pasture purposes if it were not in the irrigation district of $2.50 to $3.00 or $4.00 an acre. It being in the irrigation district and water available for it, there is a difference in the cost of irrigation, the cost of lifting the

(Testimony of Charles F. Lambert.)

water by pumps is a very important factor. [203]

I take into consideration in fixing values on that land the cost of operation and productivity of the land itself and from what tenants have said there was eighteen thousand bags produced this year on six hundred acres on this part of the land that I valued at fifteen dollars and I don't know of any crop on the east side of the canal and there must have been some in the lower portion and I did not investigate it.

"Q. Have you made any investigation to determine what was the last time any crop of rice was raised on the three hundred and twenty acres east of the canal?

A. I didn't seek out that information. I have passed by it many times. I would say it has been at least three or four years since there was a crop on the portion of the land east of the canal.

Q. You don't know definitely?

A. I couldn't swear as to that. I didn't inquire into it."

I have known lands to produce rice for eight consecutive years and when I said rice could be produced for eight consecutive years on land I did not have in mind land lying in Section 16 north and east of the Barceloux place and the only lands I know of that have been raising rice continuously—not in the last two years, but for a period of eight years, are the Stanley Moore lands west of Williams and the Stanley Moore land is entirely a different type of soil and the lands are now being planted to alfalfa and they differ and vary not only in surface structure but in subsurface structure and the Moore lands

(Testimony of Charles F. Lambert.)

are on the old Cortina Creek and are very deep. Those lands do not compare favorably with the Willows clay adobe which according to my appraisement is more adaptable to rice and I will say that the lands of Stanley Moore are the best land I know of [204] in the valley based upon experience of production and continuous growing of rice.

I am familiar with the McDevitt lands. I did not know that land raised rice for seven consecutive years. It seems to me I have always seen it in rice, but I am not certain. I don't know from my investigation what rental the tenants on the Barceloux ranch paid the Barcelouxs on that land where eighteen sacks of rice were raised.

The difference between my value of fifteen dollars an acre on part of the Barceloux land and my value on the part of the land adjoining which I appraised at $40.00 is based as I stated a few moments ago—the value of the rice land on the home ranch was fixed under the theory of its being an irrigated crop either of rice or its value for pasture purposes, the difference being made up on that basis, based on the cost of operation as one against the other.

As between dry land and wet land meaning irrigated and unirrigated growing rice or pasture on the theory that the lands are in my opinion only capable of producing under irrigation either of those two crops as between wet land and dry land the difference between the types of soil would be wiped out and the difference then in value would be the added cost of operation of the irrigation system itself and in other words the pumping cost of lift-

(Testimony of Charles F. Lambert.)

ing water to that area and I am talking about the fifteen and twenty dollar land as the forty-dollar land is not irrigated land and the forty-dollar valuation is based on the dry land farmed to wheat and barley.

The land that is adaptable to barley and wheat and farmed in the method I say as generally practiced in this neighborhood is worth twenty-five dollars more per acre than the adjoining land [205] situated in the irrigation district and I fix the difference principally upon the net revenue, based upon the net revenue that is obtainable and has been obtained, during the past eight years, between dry farms and irrigated crops. In figuring the value of the property under the present market conditions; under the present cost of production, grain farming will show on a basis, without valuation of the lands, a small net income between the actual cost of farming and the sale of the produce produced. That has hardly been true in rice and crops of that nature. That is, rice lands that they have attempted to grow corn on or swamp for pasture, the difference being the cost of irrigation, reclamation and the principal payments on bond; to a man investing in lands, while an investment on the principal of his bonds is a capital investment, he is not in a position to own it unless he can meet those payments out of his income, it being assumed that a man owning land owns land as his sole business and source of revenue. In the case of the Barceloux Corporation, they have other sources of revenue and they don't apply in this case.

(Testimony of Charles F. Lambert.)

To an extent my opinion of values of land are fixed upon the productivity and net revenue and I try to take in every element that could possibly be considered and I tried to take into consideration that we have a good Republican President and are going to get increased tariff and farm relief and the broken stock market leaves a lot of poor fellows that will want to buy lands again.

I will enumerate the factors I took into consideration in estimating the value of these lands; in fixing the value of this property I took into consideration my personal knowledge of them for a period of years as to their highest value during the days of high land values; as to the fact that they were irrigated or unirrigated; [206] the amount of the bonded debt per acre; the amount of the cost of operation or assessments of the irrigation district; the amount of assessments of Reclamation District 2047 at this moment, and the early maturity of the principal bonded debt of 2047; location as to distance from town, schools, highways, roads; contour of the surface of the ground as to its fall per mile and care of winter waters; consideration of the values of lands that have been sold adjoining this, for cash; lands that have been sold under assessments, to the irrigation district of equal types of soil and location, and in two instances a much better type of soil, and the fact that those lands have been offered and are offered at this time for sale and no buyers, at a price considerably less than the price mentioned in my appraisal; the fact that there is a general feeling over this whole coun-

(Testimony of Charles F. Lambert.)

try and has been such feeling since 1926 and prior thereto, that agricultural lands for investment purposes are not profitable, and that investors or buyers are unobtainable. I think that covers all of the factors I have in mind.

I know of a sale of Section 21 for cash and that is the Ellis place and I understood the time the sale was made it was a sale of convenience or necessity and I have the irrigation assessment sale to the district of the Mercantile Trust Company of Section 28 and Section 28 is an alkali piece of land, Willows clay with alkali and formerly farmed by Egglebert and adaptable to rice and pasture and nothing else and that land went to Egglebert and the Mercantile Trust Company on a mortgage and they didn't pay the assessment and that is rice land. The Egglebert land, Section 27, a portion of it is exactly similar to the lands lying in the Barceloux tract about 360 acres of land in th Barceloux tract are [207] exactly similar, a portion lying east of the canal and a portion of it west.

On the lands in the irrigation district there are no subsequent assessments when it is sold by the district and the deed rests in the district, the district cannot assess themselves and therefore cannot assess the land they own.

The sale of the Mercantile Trust Company of San Francisco, land, or assessment sale No. 705, Glenn-Colusa Irrigation District, Section 28, Township 19, North, Range 3 West, six hundred and forty acres. The sale was made to the district by the tax collector August 24th, 1926, for delinquent

(Testimony of Charles F. Lambert.)

assessment, for $1,664.00, delinquent assessments for the years 1925, 1926. The land was deeded to the district on September 5th, 1929, with costs added, making a total of $1,830.90.

That $1,830.90 represents the 1926 assessment alone and the 1927 and 1928 assessment was added only to the redemption and what the assessments amounted to I wasn't concerned in that and didn't take them up at all, and so far as the owner of the land was concerned the land was assessed in 1927 and 1928 and also assessed during all those years by 2047 and by the county.

I do not know of any sales under forced conditions or of necessity where lands comparable to the Barceloux lands sold for fifteen dollars, twenty dollars or forty dollars an acre, type for type and quality for quality and were I told that sales of like land have been made for seventy or seventy-five dollars an acre that would not change my opinion as to the value of the land or its market value. [208]

Redirect Examination.

(By Mr. HUSTON.)

When I spoke of the early maturity of the bonded indebtedness of Reclamation District No. 2047, the lands under 2047 for the present paid only interest and the maturity of those bonds serially begins in 1932 and up to 1932 there will have been no retirement. [209]

TESTIMONY OF JOHN P. RYAN, FOR DEFENDANT.

JOHN P. RYAN, after being duly sworn, testified as follows:

Direct Examination.

My name is John P. Ryan and I reside at Willows and have resided there for twenty years and in the county for about thirty-three years and my business or occupation is that of civil engineer and the last few years I have been doing a little speculation in land and have done land appraising also, and some of the time during the past twenty-five years have been employed in Glenn County as an engineer. I have been identified with the Glenn Colusa Irrigation District and I was superintendent for one year and superintendent for the West Side Canal Company for a couple of years and tax agent for them several years and also engineer for the old Sacramento Valley Irrigation Company and numerous other concerns around here for a great many years and for the past five years it has been principally in connection with land deals, reports and appraisals and I have had experience in the matter of appraisment of land in this vicinity.

My first appraisals in this county were for the county assessor 1914 at which time I aided in assessment of all the lands in the valley and the last few years it has been in connection with my own operations and reporting for land buyers and

(Testimony of John P. Ryan.)

various parties and I am acquainted with the lands known as the Peter Barceloux holdings and have been acquainted with those lands since 1909. I have here some maps annd memorandum I made for my own use at this time and there is a difference in the soil type of those lands.

I have been over the Peter Barceloux Company holdings numerous times during the past twenty years and went over them again about two weeks ago and I am acquainted with the soil type of the [210] land and with the market value of the land.

I am acquainted with the three hundred and twenty acres of land which lies east of the canal on the home ranch and I know the market value of that land and it is about $1.00 an acre.

I am acquainted with the land that lies west of the canal, that has been devoted to rice during this present year and I am acquainted with the soil type on the home ranch and the market value, and the market value of that land is about twenty-five dollars an acre.

That portion of the home ranch devoted to rice this year and comprising six hundred acres lying west of the canal, a portion of that is a low-grade soil with considerable alkali which in my opinion has no material value and I put that at one dollar an acre and between thirty and forty acres of that type west of the canal and it is of that low-grade type with alkali content which has a low value in my opinion it really would have no value whatever, and I put that in at a nominal sum of one dollar an acre. The balance is Willows loam and Willows

(Testimony of John P. Ryan.)

adobe soil and it is valuable for many other purposes besides rice and is within the Glenn-Colusa District and is within Reclamation District 2047, and for that soil type my valuation is twenty-five dollars an acre, and this particular tract of the ranch which I just testified about is in Reclamation District 2047, and also in the Glenn-Colusa Irrigation District and I am acquainted with the balance of the home ranch lying westerly from it a nine hundred acre tract and the soil type is called Willows loam and Willows adobe and I am using the classification adopted by Agricultural Department Soil Survey of the Colusa area in giving these soil names and that is a Government classification. I have examined those lands in the remainder of the home ranch lying westerly from the nine hundred acre tract as to its soil type, and it is entirely Willows loam and Willows adobe and in my opinion the market [211] value of those lands is fifty dollars an acre and on it is a rice camp and has the old home ranch buildings, residence and several barns and is fenced throughout but I didn't pay very much attention to the fence, it is all barbed wire and I think it is a hog fence—with cross-fences, too.

I am acquainted with the Longmire ranch, it is two sections less the railroad right of way, about one thousand two hundred thirty acres I believe and I have been acquainted with that ranch for twenty years and during that time to the best of my knowledge it has been entirely devoted to grain, a dry crop and it is not involved in the reclamation

(Testimony of John P. Ryan.)

or irrigation district. As far as I know there are not any wells or water facilities for that land and the improvements are complete fencing, cross-fencing, warehouse along the railroad and a few old buildings at the main headquarters.

The soil type of what we term the Longmire ranch is classified entirely as Willows adobe with the exception of a few acres along the south side of Section 5, classified as Willows clay and I know the market value of that land and the north half of Section 5 I value at forty-five dollars ($45) an acre. The south half of Section five, a portion of the south half of Section 5, two hundred and eighty-three acres (283) I also value at fifty dollars per acre. Forty-five dollars for the north half and two hundred and eighty-three acres of the south half at fifty dollars per acre, and thirty acres of the Willows clay, which is on the margin line along the south boundary at twenty-five dollars ($25) per acre. Section 6, being the western section, is fairly uniform in quality, all being Willows adobe, I value that at fifty dollars ($50) an acre.

The general land condition in Glenn County in the last ten years as to marketability of farm lands is, since 1920 there have been relatively few changes and values tending to go down from the [212] peak of war prices for two or three years, probably up to 1924 and 1925 and since that time the general values have been uniform and sales have been at a uniform price and there haven't been very many take place, however. The cause of the decline or condition of stagnation in the market of farm lands

(Testimony of John P. Ryan.)

in this county—part of it was just due to the general decline of land values of agricultural land values which was general all over the United States possibly that was more severe in this district caused by difficulties in the rice cultivation and the irrigation and reclamation taxes which are heavy in portions of this community and the decline continued from a peak established during war prices in 1919 down to 1924 but I have not noticed any difference in the last four or five years. The effect if any upon lands lying in the irrigation or reclamation district as affected by these prices is, the past reliance upon rice, the bonds, with later large taxes accruing on those lands, has resulted in a very much depreciated value, possibly in many cases, and at this time it is very difficult to dispose of them at any price at all. Many within the reclamation, over twenty-five thousand acres, have abandoned their lands, over twenty-five thousand acres have been abandoned by the land owners, that is to say in the reclamation district and I am acquainted with the entire acreage are in the district.

The percentage of the whole would be two hundred and twenty thousand (220,000) acres, roughly, within the reclamation district. The reclamation district has already taken deeds to fifteen thousand three hundred (15,300) acres, and approximately eight thousand (8,000) more has been abandoned since that date, since last June.

There would not be any uniform amount for which the district would take title to this land and the reclamation district in its sales simply takes it

(Testimony of John P. Ryan.)

for the current six months assessment, the [213] average assessment being about seven per cent and for the six months it would be three and one-half—about fifteen dollars an acre and the total assessment averages roughly fifteen dollars an acre and the semi-annual call being three and one-half per cent of that. The sales have greatly exceeded that figure I gave you and that is the land that has been deeded and which it is more or less known was abandoned by the owners and there is no redemption intended and in the reclamation district the land owners are usually paying on the better quality of land and are abandoning the poorer land with the exception that numerous small holdings of twenty and forty acres of good land are also abandoned that being due to non-residence or numerous other reasons and regarding the Glenn Colusa Irrigation District I have no figures at this time as to the percentage that the district has taken over. A portion of the lands which have been abandoned have not been formally taken over by the district. In a general way the abandonment within the Glenn-Colusa District at this time is approximately twenty thousand (20,000) acres, including the Williams district annex, out of a total area of one hundred and twenty-three thousand (123,000).

In fixing my valuations on my market value I took into consideration the fact that that land is within the irrigation district ot this time has rather depreciating effect upon the value and lands are not nearly as readily salable within the irrigation

(Testimony of John P. Ryan.)

district at this time as they are without the boundaries.

The following are the figures regarding the taxes upon the Barceloux land in the reclamation district and the Glenn-Colusa district: The county tax paid in 1928 and 1929, amounts to four thousand eight hundred sixty-six dollars and fifty cents ($4,866.50). The charges by the irrigation district were two dollars and sixty cents ($2.60) per acre. I haven't the total of that. The assessments [214] levied by the Reclamation District Number 2047 are as follows: On section twenty the total of Assessment Number One is seven thousand three hundred eighty-four dollars and fourteen cents ($7,384.14); section twenty-nine, is three thousand seven hundred ninety-nine dollars and eighty-eight cents ($3,799.88), making a total of Assessment Number One on the Barceloux land of—eleven thousand one hundred eighty-four dollars and two cents ($11,184.02). On that there is an annual call of six and nine-tenths (6.9) per cent, at least it has reached that for the last two or three years. That would require an annual tax of seven hundred seventy-one dollars and seventy cents ($771.70). On Assessment Number Two of the reclamation district, section twenty is fifteen hundred forty dollars and eighty-eight cents ($1540.88); section twenty-nine, seven hundred thirty-nine dollars and five cents ($739.05), making a grand total of Assessment Number Two of two thousand two hundred seventy-nine dollars and ninety-three cents ($2,279.93) on which there has been a annual call of twenty-five

(Testimony of John P. Ryan.)

per cent, plus interest on any unpaid balance at the rate of seven per cent, the principal alone amounting to five hundred and seventy dollars ($570.00) per year, plus interest, making a total that is being paid Reclamation District this year of possibly thirteen hundred and forty-two dollars ($1342.00).

The annual charges levied by the Glenn-Caluso Irrigation District is $2.60 per acre not including the water tolls, five dollars an acre for rice and one dollar an acre for other crops. The total value of these two properties, that is the value of the real estate of the property we have been discussing is one hundred thirty-six thousand seven hundred twenty dollars ($136,720.00), and that involves all of sections 5, 6, 19, 20, north half of 29 and all of section 30 and takes in what they call the home ranch and the Longmire ranch and just those two properties. I am acquainted with the [215] Cartenburg tract but I haven't been over that particular block of land for some time and that includes fifty acres of land in lots 25, 30, 31, 40 and 41 of the Cartenburg tract.

Not having been over it recently possibly for three or four years, I would put the value on that at fifty dollars ($50.00) an acre. The alkali condition on the home ranch is, on the land east of the canal the alkali has a tendency to come to the surface since water is put on the canal and used for rice land in that neighborhood and so it is rather bad at this time and the balance of the land west of the canal except for a few minor points is not affected by alkali.

(Testimony of John P. Ryan.)

I don't believe the canal itself has any such effect that is tending to raise the alkali condition of the land but the combination of the canal and raising of rice in that community has had the effect of giving surface concentration there greater than prior to the canal's construction and at this time portions of that land show up rather white.

Cross-examination.

I was over this land two weeks ago as Mr. Belieu asked me to make an appraisal of property and I drove around them and all around the upper place and I have been over that numerous times in the past.

On the Longmire place I drove through the middle of it north and south and on the south place I walked out through the rice fields considerably and went all around the place, went in through south of the buildings, just in general to refresh my memory as to conditions surrounding the place and so on. I was employed by Mr. Belieu—I expect to be paid for my services. [216]

I have made a summary in writing of my investigation but it is not complete yet and just gave a copy of it to Mr. Belieu a few moments ago. During the last few years I have not bought or sold any lands outside of the irrigation district but I have bought land inside the district and about a year ago I bought the Elkus land near Jacinto and three years ago I bought the Ross ranch adjoining town here and I have been connected in an indirect

(Testimony of John P. Ryan.)

way with other sales in addition to the Esperanzo lands and also the Monoroeville orchard, and also have had something to do with the selling of the Esperanzo lands up there, and all these purchases were made for the purpose of resale and I din't buy any of them with the idea of operating them and the Elkus land was bought last December and was owned by nonresidents and had been adapted for rice for several years.

The Ross land adjoins the town of Willows on the east side of the canal and south of the Glenn road and I bought those lands from Elkus about three years ago and I sold that to Mulick and I only had the land a few weeks and sold them to Mulick for seventy dollars an acre and the Ross land is within the irrigation district and reclamation district and had a few old buildings on it. A portion of it had been in alfalfa and levelled up for that purpose and the checks were there on it and the land is a Willows loam and adobe and about the same general type as the home place of the Peter Barceloux Company.

I resold the Elkus land in about six or seven months but the type of soil of the Elkus ranch and that of the home place are entirely different. The land in the Jacinto district taking the Government classifications again, Sacramento silty clay loam, that being the river type of soil. Some Sacramento silty clay which is rather close grained soil, some Willows loam and some San Joaquin loam. [217]

The Sacramento silty clay is a poorer type that will raise grain but is not adapted to irrigated crops

(Testimony of John P. Ryan.)

and all the other Elkus lands are in the Jacinto Irrigation District and I think it has been in rice crop three times and Elkus had an arrangement with the Provident District for water.

From Dr. Cashaw we bought the Monroeville orchard and that is way up in the northern end of the county and unirrigated land.

In various capacities I have been connected with some other affairs that I haven't bought myself but I have not taken over some of the lands that have gone back to 2047 for lack of payment of assessment and some of the lands in the Glenn-Colusa District for $1.00 an acre I was unfortunately tied up with and I couldn't get the $1.00 for it and they were the Esperanzo lands and the district has taken title to most of that and some of that was Willows loam and Willows adobe or a lower quality of that tpye but not as good as the Barceloux land. I believe I did buy those lands. I operated them and paid the expense out of the operating returns I base my value of one dollar an acre upon part of the Barceloux land upon my very close contact with all of the operations of rice and other crops within the district and made a special study in connection with assessed values of the Glenn-Colusa District last year and two years ago and also some more recent reports I have been making, and it is a fact that none of the clay lands in the district are at this time under cultivation to any substantial extent and any cultivation that is attempted is always carried on at a loss. The lands have no value, therefore,

(Testimony of John P. Ryan.)

for any purpose except pasture, that is based upon returns or any other assumption of value.

I do not know of any sales of lands that have been sold like the Barceloux land for $1.00 an acre, but I have sold similar lands for [218] $4.00 an acre of the same quality and I have been over those lands and had an option on them but did not buy them because it is my idea all clay lands will be abandoned by the owners and the district will take title to it. It is true there is a lot of land as good or not as good as the Barceloux land east of the canal that paid its assessment and taxes every year but in no case is that tax obtained from the land but there are lots of lands upon which the assessment and taxes are paid annually by the owner and the Spaulding ranch paid its taxes and assessments annually and as compared with eastern sections of the Barceloux land are the same general type but possibly slightly inferior to the Barceloux land and the irrigation district assessments would be identical and the reclamation district might be a little variable but not substantially different. The most recent sales of similar land as compared with the west part of the Barceloux land were those made by the Superior California Lands Company last May or June west of Monroeville along the canal south of the Durbrow land and the Superior California Lands Company is a liquidating concern, being one of the relics of the old Sacramento Valley Irrigation Company.

Another similar sale of similar type was the

(Testimony of John P. Ryan.)

Spier and Scheeline ranch at Delevan which land is east of Delevan and is about the same kind of soil as on the Barceloux place. When you spoke of the western portion which I valued at fifty dollars an acre on the home place I do not know of any sales of like quality of land of a similar valuation, but I have recently been offered land south of Maxwell of similar quality slightly less quality at forty-two dollars and at another place at fifty-five dollars outside of the irrigation district and about the same kind of soil and the fifty-five dollar piece was a little better than the best of the Barceloux land and is four miles west of the highway and about seven miles from the town of [219] Maxwell.

The home place you mention is one mile from the highway and the county has a road on three sides of it and is about four miles southwest of Willows and slightly compares more favorably as to location than the Maxwell land.

With reference to sales around the neighborhood of lands which can be compared to the west section of the west side of the home place the Sinnard land north of Germantown sold in the last few years for forty dollars an acre, three hundred and twenty acres, which land is two miles north of Artois and about eight miles from Willows and on the highway and Sinnard was a resident of San Francisco and the only lands around this neighborhood which has been sold and which can be compared to the west part of the Peter Barceloux home place is the Ellis ranch west of town sold a little

(Testimony of John P. Ryan.)

over a year ago and that is five miles west of Willows and I believed contained twenty-five hundred acres, most of it level ground including some rolling land, a little rock and waste land, but I don't know how much waste land there was in the twenty-five hundred acres or how much rolling land, but it is probably all farming land and the waste land I think did not exceed one hundred acres and possibly one-third of it is hill land which my recollection is sold for fifty dollars an acre and was sold at public auction on foreclosure.

The Snowden ranch which was sold a few days ago was reported to have been sold at $100.00 an acre and the Snowden ranch lies directly west of the Peter Barceloux home place and is across the road from it and there are no other sales I know of in this locality of similar land and my understanding is the Snowden place has a thousand acres in it. Possibly there are two sections of it; I wouldn't be sure.

It is my opinion that values are depreciated by reason of [220] the fact that the lands lie within the district and the lands outside of the district have been slightly depreciated in this neighborhood in bringing outside buyers by the mere fact that all the lands in the community are generally considered to be irrigated land and therefore they discount the whole community on that account. During that peak period of 1919 I referred to there were very few sales that took place above the canal. Under the canal some of the land which I valued at one dollar an acre to-day may have been sold

(Testimony of John P. Ryan.)

for twenty-five or thirty dollars an acre then. Other lands which were sold at twenty dollars recently, had been sold as high as fifty or sixty.

The lands of the Peter Barceloux Company which I valued at one dollar an acre includes three hundred and twenty acres. The Barceloux Company paid all county taxes, the Glenn-Colusa assessment and the reclamation assessment on those lands and have paid them every year and the reclamation district was formed in 1919 and the first assessment was 1924 and the lands of the Peter Barceloux Company went into the Glenn-Colusa District in 1920 at the time of its organization.

The lands above the canal that is in the irrigation district that is part of it is irrigated by means of a lift which consists of about six hundred and twenty acres of the Peter Barceloux Company's land and the average cost per acre for lifting the water is three dollars an acre and the cost of water for rice is three dollars an acre and the cost of water for rice is five dollars an acre and two dollars and sixty cents per acre for assessment and save for the water toll which is only paid when the land is in crop, all of these things have been paid every year by the Barceloux Company and I might say in connection with that, however, that the land is assessed by the District as a section and that the inferior land laying east of the canal is tied up with the part of better lands west of the canal, it is not possible at this time to separate the two if they wanted to abandon it. As a matter of fact they have been paid in full. [221]

(Testimony of John P. Ryan.)

I am not familiar with the sale of the Charles Hanson ranch and I don't know that property.

The Longmire ranch is within one-third of a mile from the edge of the town of Willows and I treat it purely as grain land and in my opinion fifty dollars an acre represents a fair value for the better quality of grain land and that is also the opinion of the appraisers for numerous banks such as the Land Bank and that is what I consider today to be the cash value of the property and within a reasonable time, three or four months, it could possibly be sold at that price and I am very doubtful if it could be sold for a greater price.

I am not familiar with any prices of sales around that place in recent years but for a few transfers and the land directly south of it was some that has been abandoned and was taken over by the district for taxes. It belonged to the Donohoe interests I believe, a defunct corporation which didn't pay its taxes and permitted the irrigation district and the reclamation district and the county taxes to pile up, and that also is an inferior clay land and not to be compared with the Longmire ranch and save for the Ellis ranch I don't know of any land which can be compared with the Longmire land that has been sold for fifty dollars an acre and I didn't know of the sale of the Devenpeck place to Lederer. I know the Devenpeck land and it is slightly better than the Barceloux land and I would say is worth about five dollars an acre more.

(Testimony of John P. Ryan.)

I haven't been on the Cartenburg lots for several years on which I placed a value of fifty dollars an acre and the adjacent land of Flemings has been on the market for years at sixty dollars with no buyer and I know of no sales but if you say Chester Robinson bought some of the adjoining land for sixty dollars an acre that is a very close figure to me now.

With reference to the assessed valuation I placed upon the [222] place in 1914 regarding its present assessed valuation I would say they are not the same in some cases and in other cases they are the same or very similar.

Respecting the assessment on the Barceloux Company's home ranch and the assessed valuation I put on those lands in 1914, in 1916 not 1914, I aided the assessor in reassessing the whole Valley part of the county and at that time there had been a wide variation in various lands that had been assessed anywhere from ten to fifty dollars an acre of exactly the same soil and so, purely for assessment purposes, we took an arbitrary value and then arrived at relatively the correct value and at that time the value I placed on section five was fifty-six dollars an acre; section six, fifty-four dollars per acre; section nineteen, forty-nine dollars an acre; all of section twenty, thirty-three dollars per acre; section twenty-nine, thirty-three dollars per acre; section thirty, forty-four dollars an acre and the present assessed valuation is fifty dollars an acre straight through with the exception of the north half of twenty-nine, which is thirty-five dol-

(Testimony of John P. Ryan.)

lars an acre and the assessed valuation I placed on Lots 25, 30, 31 and 41 Cartenburg tract, I haven't that information and as to section five, fifty-six dollars an acre and the assessed valuation of that is fifty dollars an acre and as I copy the information from the roll it is all fifty dollars and it is divided up in the present assessment-roll as the north and south half.

If I were offered the Barceloux land east of the canal with the taxes paid on them for one dollar an acre I would pay one dollar an acre if I didn't have to continue in ownership, and as a land speculator I wouldn't go as high as four dollars and I mean I would go as high as three or three and one-half.

As to being valueless or one dollar an acre on the market there is a little difference in there and lands have a speculative value and [223] may have no basic value and although the basic value is absolutely nil they still may have a speculative value and they might be a liability to the owner but I might go to San Francisco and pick up a man on Montgomery Street that would think it was worth ten dollars an acre, all land has not a speculative value and I have been a "bear" on lands in the irrigation district for many years.

It is not my belief that all the bond issues of all the districts are going into default and all the lands go back into the hands of the district and it is my belief that all the Willows clay soil in the district will go back into the district if the tax is continued. It is also my belief that there will be an ad-

(Testimony of John P. Ryan.)

justment, and that the Williams District Bonds Provident District Bonds and Delavan District Bonds will go bad and there will be an adjustment. It is possible there will be adjustments on some of the other districts. But that is not a broad statement involving all the districts in fact, they have gone bad already.

This gross value of one hundred thirty-six thousand seven hundred and twenty dollars does not include the improvements and as to the improvements I looked at all the buildings but I did not go into the residence down there and I placed the same value as Lambert did of forty-five hundred and fifty dollars, no, I want to correct that figure, sixty-nine hundred on both ranches for the improvements and the value I placed on them is fifty-five hundred and Lambert placed sixty-nine hundred on the improvements. Lambert's value on the home ranch was sixty-five hundred dollars for the building and fifteen hundred dollars for the pumping plant and as to the Longmire ranch the building value there, was thirty-two hundred and fifty dollars and twelve hundred dollars for the fences, and excepting for the fact I didn't pay any attention to the pumping plant I considered [224] that in the value of the land otherwise it was close enough and I think my values were five hundred dollars less than his and I don't seem to have my original notes.

The value on the improvements on the two places is ninety-four hundred dollars exclusive of the pumping plant which I have included in the land

(Testimony of John P. Ryan.)

value giving a total value of improvements and realty of one hundred forty-six thousand one hundred and seventy dollars, and in measuring up my report at that time I did not have Lambert's report nor had I read his testimony and I have before me now Lambert's report which is made subsequent to the time I made up my own values and I saw Lambert's report subsequent to the time I made my own values, and I did not confer with Lambert about these values.

Redirect Examination.

(By Mr. BELIEU.)

When I said the Provident Irrigation District was going bad, I meant by that a large percentage of the land owners are not paying their taxes to the district and the district in some cases had already defaulted on their bonds and would probably default in other cases in the near future.

When I said in connection with this district that there would be a re-adjustment I meant the bonded debt upon the land is greatly in excess of the value of the land at this time in most of these cases and the bond owner under those conditions cannot expect to receive par for his bonds and must make some adjustment with the land owners before the land owners will continue to pay taxes. Possibly thirty-eight per cent of the Provident District is in default at this time.

The Provident District is about four miles east of Willows and in the Compton District possibly twenty per cent are in default [225] and in

(Testimony of John P. Ryan.)

the Williams District ninety per cent are and the Williams District has been taken into Glenn-Colusa and ninety per cent of that area is in default and the Maxwell district is east of Maxwell and also in the reclamation district and the total default of this district will have a bearing upon lands here within the more solvent district, just due to the fact they are all jointly entangled within the reclamation district, and these districts are all in Glenn County and the northern part of Colusa County, adjoining Glenn.

The Superior California Lands Company is the successor of the old Sacramento Valley Irrigation Company which was a land company and owned the canal system and the Superior California Lands Company has been trying to liquidate since 1914, and when they started to liquidate had seventy-six thousand acres and it now has left about thirteen thousand acres.

The lands of the Superior California Lands Company are scattered all over from a point fifteen miles east of town to a point two miles south of Maxwell and they have a generally fair or good quality of land and they have about eight hundred acres of low grade land which has been abandoned and the rest is medium or good grade stuff and the Superior California Company will sell for cash or on time but the deals I have been referring to is cash and the general policy is on time.

The lands I mention being recently bought and resold is a mile and a quarter from the river—south end of Jacinto district near Sids Landing

(Testimony of John P. Ryan.)

and there are three or four different soil types on that portion and some of it the highest quality of soil and some the same type as the Barceloux land and a portion of it was relatively low grade soil adapted to some irrigated crops and it was involved in [226] a trade—essentially cash however, at about eighteen dollars an acre.

The bonded debt against that land is about thirty dollars an acre and it was in the Reclamation District and the thirty dollars included reclamation and irrigation taxes.

Jacinto Irrigation District charges are sixteen dollars an acre and the Reclamation District are about fifteen dollars an acre.

The Glenn-Colusa Irrigation District has always met its bond payments and interest payments and I don't know that it has money on hand to meet the next installment due in cash.

"Q. Hasn't your investigation shown you that?

A. I haven't checked over the last month or so to see if cash was available."

The other districts that have gone into default were practically rice growing districts.

The Glenn-Colusa Irrigation District—the major portion of it is not irrigated but pays its assessments.

(In answer to the Master's questions, the witness testified:)

At one time I represented a number of large taxpayers in the county that were being discriminated against, they forced through a change and a practical re-adjustment and I worked on the re-adjust-

(Testimony of John P. Ryan.)

ment of the assessed value in 1915 and it became effective in 1916, the assessment year.

What they were after was to reassess the land of the county so as to make the values more relative uniform and we changed all the valley and some were increased as high as eight per cent and some were decreased as much as seventy-five per cent, and involved every tract only in the valley portion and not in the hill section or incorporated cities and we were about six months on the work and I was employed by [227] the land owners of the county and worked with the assessor and after I and the assessor finally agreed our agreement was adopted as the reassessment of the sections covered by our work. I have no knowledge of the number of bags of rice taken from the Barceloux land this year. The productivity of the Barceloux land for one year would not have any effect upon my opinion as to the value of the land for rice growing purposes and the productivity for four or five years would fix values and where I told that that land produced thirty sacks of rice to the acre this year that would not change my opinion as to its value. It was idle this year and I think the year before and raising that crop of rice would necessitate the operation of the pumping plant and thirty sacks of rice per acre is very much above the average raised in this community. As to being a profitable crop under the prevailing market prices including the pumping plant cost, the hazard of the weather, etc., according to my experience to produce a thirty sack crop of rice under the con-

(Testimony of John P. Ryan.)

ditions there, not including taxes or interest on the land investment, would be in excess of fifty-seven dollars an acre. Thirty sacks of rice this year would be probably about sixty-five or seventy gross.

That fifty-seven I gave you is the gross cost of production and I am not considering that the land owner is receiving one-third of that crop and I am considering it strictly from a production standpoint and thirty sacks is not the average however —that should be an average of twenty-two or twenty-three sacks and I would say thirty sacks to-day is an excessively unusual crop. Since 1918, 1919, there has been a substantial decrease in crop production and lands by that canal often produced forty-five or fifty sacks and this fifty-seven dollar cost I just mentioned affects the land owner because the [228] land owner has to consider the cost of operation and if the tenants do not make anything the land owner doesn't and if the land owner gets one-third of the crop that is net to him less the charges of the pumping plant on that basis the tenant loses money. I haven't the records before me, but I doubt if the land has been operated every other year to rice and were it a fact that the land owner received ten sacks of rice per acre this year out of six hundred acres would not affect my idea of the value of the land because on that the land owner had lost money in operation and he receives ten sacks which at two dollars and twenty-five cents ($2.25) would be twenty-two dollars and fifty cents ($22.50) per acre, out of which he had to pay about eight

(Testimony of John P. Ryan.)

dollars ($8.00) an acre for water, leaving him fourteen dollars ($14.00) per acre and out of which he only had in six hundred acres, but he had to pay taxes on nine hundred and twenty acres (920) at a rate of five dollars ($5) an acre, and some odd cents, or about ten thousand in taxes in order to get his fourteen dollar per acre crop. If he wanted to keep his land he had to pay those taxes whether it was profitable or not but some of these cases are where the money came from outside sources, but the Peter Barceloux Company has paid.

In my examination where I refer to certain soil classifications and mention Government classifications, I referred to the soil survey of the Colusa area of the Department of Agriculture and the land I classified at one dollar an acre is Willows clay and I made an investigation of those Willows clay lands and the history of the land in the county. Within the Glenn-Colusa Irrigation District there are thirty-six thousand eight hundred acres (36,800) of this soil type, involving many land owners, some of them relatively large [229] owners and with independent means to carry on, and during that period the planting has ranged from four per cent minimum, to a maximum of ten per cent of the area, with an average of twenty-two hundred acres planted out of thirty-six thousand eight hundred acres, or an average of six per cent. The taxes alone, that is reclamation, irrigation and county, not including water charges, upon each acre of land has been seventy dollars ($70.00) per acre, for the whole period, and that is for each year of the five

(Testimony of John P. Ryan.)

years and each year the taxes have been seventy dollars an acre ($70.00) for every acre producing.

I have the crop history of practically all the lands in the Glenn-Colusa District of that same type and I have here the crop of the Ellison land adjoining the Barceloux property and entirely clay land and also numerous other tracts. In sixteen and seventeen it was not in crop. In eighteen and ninteen four hundred acres; in twenty four hundred and sixty acres; twenty-one, twenty-two and twenty-three, twenty-four, twenty-five, no crop. In 1926 I haven't got the acreage, and in 1927, one hundred and twenty acres, and in 1928, two hundred and seventy-two acres. The average planting during that whole period has been less than ten per cent.

The average rice planted in the whole Glenn Colusa Irrigation District for the same period, 1923 to 1929 has been seventeen (17) per cent, or an average of nineteen thousand four hundred (19,400) acres, ranging from a maximum during that period of twenty-six thousand down to a minimum of twelve thousand (26,000 to 12,000).

Mr. FREEMAN.—When you say seventy dollars ($70.00) an acre taxes, you mean the taxes against all the Willows clay land, or charged to that part of the Willows clay land that produced a crop?

A. Yes. [230]

The Ellison land is not nearly as good quality as even the easterly portion of the Barceloux land, and I understand that the Ellison land sold for more than one dollar an acre. [231]

TESTIMONY OF HARLOW M. PLIMPTON, FOR PLAINTIFF.

HARLOW M. PLIMPTON, after being duly sworn, testified as follows:

Direct Examination.

(Examined by Mr. GEORGE R. FREEMAN, One of the Attorneys for Complainant.)

I reside in Willows and have resided there for seventeen years and my business is real estate, grain, wool, and insurance broker and I have been engaged in banking in this county and I was associated with one of the local banks as cashier and manager of the Glenn County Savings Bank from 1912 to 1917.

I own lands in the county of Glenn and have owned the same for nine years and at times I have owned other land in addition to land now owned by me, farming land southwest of Willows. I have been in the real estate business since leaving the bank in 1917 and have dealt in farm lands and town property and have kept myself informed as to the sale of various parcels of real estate in this county and I know the Peter Barceloux Company land known as the home place, consisting of 2,300 acres and I have known that land during the time I have lived in this county and have indirectly dealt with it in purchasing grain and know what it produced in the past and I know the market value of that land at the price which is could be sold in the open market a reasonable time being

(Testimony of Harlow M. Plimpton.)

given to find a willing buyer from a willing seller. In my opinion the market value of the Peter Barceloux home place situate southwest of town consisting of twenty-two or twenty-three hundred acres is the portion of the ranch that lies east of the canal, which is of the poorer type, and also a portion of the land lying west of the canal, which is a better land but not as good as the western part of the [232] ranch — the land east of the canal I would say is worth twenty-five to thirty dollars an acre ($25 to $30). The land under irrigation and lying west of the canal, comprising approximately, I think, seven hundred acres, is worth sixty dollars ($60) an acre. A portion of that land is adaptable to the growing of alfalfa. The balance of the ranch I believe is worth one hundred dollars an acre.

I know the Longmire ranch west of town which is about two miles west of town and I have had occasion to buy the crops produced on that place and have had occasion to observe the crops grown on that place. In my opinion the market value of that land taking into consideration the difference in quality between different parts of it is there is a portion of it in the northeast corner and also a portion in the southeast part of the ranch which is poorer quality I believe. That acreage, I should say, wouldn't be over eighty to one hundred acres. I think that land is worth fifty dollars ($50.00) an acre.

The eighty or one hundred acres would be worth

(Testimony of Harlow M. Plimpton.)

fifty dollars an acre and the balance of the ranch I consider worth, based upon other sales, in the immediate community, is eighty-five dollars ($85.00) an acre. I think about three hundred and twenty acres is east of the canal on the home place and in my opinion the market value of it to-day and on the 16th day of August, 1926—I don't believe there is very much difference and the land is a little more active now and I think possibly would sell more readily now than at that time, but I don't think there is any difference in the value.

Cross-examination.

(By Mr. HUSTON.)

The last time I was on the home ranch was in the year 1914 [233] and prior to that time I was on the land practically every year but whether the home ranch or the Longmire ranch has paid a profit or had a loss since 1914 I don't know and when I say I am familiar with the production I have insured crops on the Longmire ranch in 1928 but have not insured the crops on the home place and my familiarity with the production on the home place is from observation only and they have a pumping system there and have to lift the water—a portion of it, but I don't know what the cost of lifting and distributing the water but I would say approximately $5.00 an acre.

I am not associated with Mr. George Freeman in a business way at this time but we were associated until about 1921 or 1922 in the operation of the

(Testimony of Harlow M. Plimpton.)

Willows Implement Company and we owned a ranch together southwest of town in 1918, 1919 and 1920.

I know the difference in taxation between the lands east of the canal and west of the canal and I know there is considerable difference, but how much I do not know. [234]

TESTIMONY OF H. C. SAMUELS, FOR DEFENDANT.

H. C. SAMUELS, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. HUSTON.)

I am farming and reside six miles and one-half southeast of Willows and I have been engaged in farming in Glenn County for seventeen years and was dairying for three years and have been raising rice since for thirteen or fourteen years and have farmed from fourteen hundred to fifteen hundred acres and it would vary from year to year sometimes four hundred and up to fifteen hundred and the ranch we own is twelve hundred fifteen acres but we put half in one year and half in another and this year we have seven hundred acres of rice and next year we will have about one thousand acres and during the time I have been in Glenn County I have farmed different lands and I have bought land but never sold any.

I first bought land in 1913 and the last tract I

(Testimony of H. C. Samuels.)

bought was in 1926 of three hundred and three acres west of town and when I first came here I bought one hundred and thirty acres a mile and a quarter west of town and I also bought forty acres out in Bayliss country which is northeast of Willows about ten or twelve miles.

The twelve hundred and fifty acres is rented from Cochram and I am producing rice on it. Not half of it. Lots of it would not produce anything not fit to farm and I farm eight hundred and fifty acres all together, no I guess nine hundred. Four hundred fifty each year. I have kept informed as to the lands situate in Glenn County, sales of land and the market for land as much as I could get at it, as much as anybody could, I guess, and I have paid [235] some close attention to it and have been familiar with land values in Glenn County for the last five or ten years and I am very familiar with the land situation in the Glenn Colusa Irrigation District and Reclamation District No. 2047 and I have bought lands at district sales and the parties who sold land under foreclosure still own it and there have been many foreclosures here. I am familiar with the tract of land known as the home place of the Peter Barceloux Company and have been familiar with it since I came here in 1913, I guess, and lived right out beside it once and own land adjoining it now. I lived along the side of the Longmire place for three years and the first place I bought ran across the road from the Longmire place.

(Testimony of H. C. Samuels.)

"A. Well, the way I would get at that is from the way that land has been sold, and the prices, I would put,—well the home place down there, as a whole—do you want to take the rice land and the grain land?

Q. You can take it as a whole or segregate it if you please.

A. This land down here as a whole valuation,—a lot of it I don't consider worth anything, so I would put it at thirty dollars an acre.

Q. As a whole? A. Yes."

The rice land I don't consider worth anything because you can't go to the bank and borrow a dollar an acre on it unless you have other security and there is not any market for rice land and the rest of the ranch is used for grain farming and according to the way ranches have sold nearer the foothills I think it is better by far, in fact any farmer knows it, and I would put it at forty dollars an acre and I am averaging it all up at about thirty dollars an acre. [236]

The Longmire place I would put the market value of that place, August 16, 1926, at forty dollars an acre and I reached that valuation because there is a lot of poor land, lots of it is not much above rice land and there is rice land right across the road from it and the road can't make much difference and when I say rice land is right across the road from it, I mean the Longmire place. I have seen it for three years, 1913, 1914, 1915 when it produced between six and seven sacks to the acre. The reason why I consider it of less value than the land

(Testimony of H. C. Samuels.)

near the foothills is because it is water-tight soil and in wet weather the grain drowns out on it and the better land toward the foothills is more porous and the water goes through and will produce more grain and I think it will prove itself up to that. That is the land that I bought, one hundred and fifty acres and I bought it for alfalfa land and the alfalfa all died out on it and just this side of that that joins the Longmire ranch is the rice land I referred to, joins the Longmire ranch for about a half mile I should judge and its the flying field at the present time—in part of it and then this other ranch is owned I think by a man named Brown that I bought it from and that land shows you the quality of it if you could dig down six inches and put water in the hole it would stand there until it evaporated and I am referring to the Longmire and right across the road. That is the genuine type of soil; when water won't penetrate the soil you have a pretty poor soil.

Cross-examination.

(By Mr. FREEMAN.)

I dug a hole six inches deep across the road from the Longmire place on the land alongside of it, on the land I bought. [237] The land that I bought in 1926, January 21, 1926, about three hundred and twenty acres joins the Peter Barceloux home place on the south this side of the canal, that is, north of the Barceloux place and the rest joins your land there and is across the road north from the part of the Barceloux Company lands and others east of the canal, and the reason I bought that land

(Testimony of H. C. Samuels.)

in 1926 was I did not know any better and I paid $7,000.00 to the irrigation district for it and the land previously belonged to the Sacramento Valley Realty Company or the California Midlands Realty Company and the California Midlands Realty Company or the former owners did not pay the assessment taxes and I did not pay the amount that was due. It was a price set and the assessment amounted to more than what we pay. The seven thousand dollars was what was due on the assessments for four years from 1921 to 1925, four or five assessments.

"Q. None of the assessments had been paid on that land from the formation of the District, had it, the formation of the Glenn-Colusa District?

A. Taxes?

Q. Yes. A. What kind of taxes?

Q. Assessments of the Glenn-Colusa Irrigation District. A. I don't know why it wouldn't be.

Q. Well, had the assessments been paid?

A. I don't know anything about it.

Q. Do you know for what years' assessments you bought the land?

A. 1921 was what we were supposed to have bought. That was the first one we were supposed to be buying. That is all I know.

Q. Did you pay up all the other assessments against the land the time you took title to it? [238]

A. We thought we had but we found out we hadn't.

Q. How much money did you pay for that three hundred and twenty acres?

(Testimony of H. C. Samuels.)

A. Seven thousand dollars ($7,000.00), besides some back county taxes. I don't remember how much that was, but we paid the Canal Company seven thousand dollars."

As to whether the purchase was made for the benefit of H. J. Barceloux and Andrew Neilson, we were under a contract of Neilson if he would pay us back the money he would get the land and we didn't intend to keep owning it and we thought it would get paid up and up to a year ago I paid both reclamation district and irrigation assessment and only missed the last one in the irrigation district and I still own the land and grow rice on it. I have been growing rice in this county for the last twelve or fourteen years. I was on the home place of the Barceloux ranch a year ago and went through there with a machine. I never did farm any part of that land.

The reason I base my value of forty dollars an acre on grain land is, the general sales out on better soil run around fifty dollars an acre.

I heard of the sale of the Snowden ranch across the road from the Barceloux place and that it sold for one hundred dollars an acre and I know about the sale of the Devenpeck place and know it was sold at fifty dollars an acre about and the pumping plant and improvements amounted to fifteen thousand dollars. The pumping plant and alfalfa work, and it sold for thirty-five thousand dollars, that would bring it to twenty thousand dollars for the raw land, fifteen thousand was for the improvement of alfalfa and pumping plant, and I know

(Testimony of H. C. Samuels.)

that because Mr. Devenpeck told me, and he told me the expense he put on the alfalfa and the pumping plant. [239]

I think it was in 1920 he put some of the improvements on and he had alfalfa on it before the rice was started but it wasn't rice land, it wouldn't hold water and he thought it was but he could not pump water enough to irrigate.

In placing the value of forty dollars an acre on the rice land or on the grain land I wouldn't be willing to buy it at all and I wouldn't give that for it.

The closer you are to the hills the better your grain lands are and while there have been sales I don't remember them now, but I think you will find there is land which has been sold for fifty dollars and some has been sold out there not a great while ago. I don't think it was.

"Q. Who bought it and who sold it?

A. I am satisfied there has been but I never tried to remember who it was."

The rice land on the Barceloux place isn't worth anything as an investment and I don't put any value at all on that part of the land and I don't know just the number of acres that there is in that rice land and some of the rice land that is in rice runs toward the grain land that may produce grain.

"Q. You don't know the number of acres in the ranch? A. No.

Q. How do you fix the value of thirty dollars an acre—what is your value on that home place.

A. Thirty dollars an acre. I only know it as a ranch and figuring it and proportioning it as it is.

(Testimony of H. C. Samuels.)

Q. You don't know what proportion is good land and what poor land do you?

A. Yes, I know the proportions.

Q. All right, what proportion is good land?

A. A little over half of it that I would figure in as grain land. [240]

Q. How many acres would that be?

A. Oh, I don't know how many there is in the ranch.

Q. You don't know how many acres there are that you fix at a valuation of forty dollars an acre?

A. If two sections I would put about eight hundred acres, or around there, eight or nine hundred.

Q. You think there are eight hundred acres of land on the home place that are worth forty dollars an acre? A. I think so.

Q. What is the rest of it worth?

A. Nothing.

Q. Nothing at all? A. No.

Q. The only valuation you put on that land as a whole would be eight hundred acres at thirty dollars an acre or twenty-four thousand dollars ($24,000.00).

A. No, I was putting the whole thing at thirty dollars, forty dollars for the grain land—that would be about thirty-two thousand dollars ($32,000.00).

Q. Your first answer was that the home ranch was worth thirty dollars an acre; then you stated the grain land was worth forty. Now, you say eight hundred acres is worth forty dollars and the rest of it is valueless, is that correct? A. Yes.

(Testimony of H. C. Samuels.)

Q. Then your total valuation of the home place is thirty-two thousand dollars?

Mr. BELIEU. — He don't pretend to give the acreage.

Mr. FREEMAN.—He is giving the valuation of the home place.

Mr. BELIEU.—He don't know if there is five hundred or five thousand.

Mr. FREEMAN. — That shows how much he knows about it. [241]

Mr. BELIEU.—A farmer knows more about it than some of these insurance brokers.

Mr. FREEMAN.—(To Witness.) How many acres in the Longmire place?

A. I think there are two sections in that.

Q. How much of that is worth forty dollars an acre?

A. Well, that is different quality land. Some of it wouldn't be worth much and some of it more,—

Q. How much isn't worth much?

A. I would have to make a closer examination than what I have. The land changes its quality, one twenty-acre tract may be better than another twenty-acre tract alongside of it, and while I have been over it I didn't figure it out in such a way to tell you where the best land is and where the poor land and dividing it up. I think the best part lays on the northwest part of the ranch.

Q. How long has it been since you have been on the Longmire ranch?

A. I was on it two years ago.

Q. For what purpose?

(Testimony of H. C. Samuels.)

A. Looking at some machinery.

Q. Were you doing some work out there?

A. I never worked on it, no.

Q. You haven't lived on that Fruto road south of the Longmire place for a great many years have you, where you first lived when you came here?

A. No, I moved off there in 1917.

Q. And you had no business to take you out there? A. I have been by there considerably.

Q. Would you estimate how many acres on the Longmire place are worth forty dollars an acre? [242]

A. No, that seems to run more even in quality of land. I have saw all along the road on the north side any amount of poor land laying there.

Q. But you don't know how many acres?

A. I don't know how many acres there is, no.

Q. How far back from the road?

A. Right along the road. Runs clear the length of the road that goes to fruit, the whole length of the ranch on the north side of the road is poor grain land.

Q. How far back does that land run from the road? A. North.

Q. How far? A. Does this poor land run?

Q. Yes.

A. Well, that's just what I don't know exactly how far it runs.

Q. Do you know whether or not there has been any sale in that immediate vicinity of lands other than the Devenpeck place, or any offers that have been made for like kind of land?

(Testimony of H. C. Samuels.)

A. The Turman place lays north of it and on the other side Boyd's. Not right in that section I don't know of any, right close.

Q. Do you know the assessed valuation of the two pieces of property?

A. No, I don't. That don't amount to anything in values.

Q. Do you know any part of the assessed valuation, or the assessed valuation of any part of the land?

A. I know ours is assessed for fifty dollars an acre and you can't borrow a dollar from the bank on it, so I know the assessed valuation don't amount to anything. [243]

Q. You place your valuation on the fact the banks don't loan money on the land?

A. If you own it and have to pay the assessments, I guess you know as much as I do about it?

Mr. FREEMAN.—That is all."

Redirect Examination.

(By Mr. HUSTON.)

The tract of land I took over from the district for seven thousand dollars is about three hundred acres. [244]

TESTIMONY OF J. E. KNIGHT, FOR DEFENDANT.

J. E. KNIGHT, after being duly sworn, testified as follows:

Direct Examination.

(Examined by Mr. HUSTON, One of the Attorneys for Defendant.)

I am a resident of Glenn County and have lived in the county forty-five years and during that time have been engaged in stock raising and farming and mostly so for the past twenty years.

I have five hundred acres on the river and a little hill land out here. My land is on the Sacramento River and about twenty-five hundred acres is hill land and I have one hundred thirty acres on the highway north of town and have little pieces scattered around and I have bought and sold land in the past. I couldn't say how many different tracts of land I have bought and sold as I have practically bought most of it in the last fifteen or twenty years and I have bought some since then five years ago on the river and a piece up the highway, eight years ago.

"Q. Have you been familiar with land sales in this county during the last fifteen or twenty years?

A. Quite a bit.

Q. Are you familiar with the land situation during the recent years, say for the last twenty years?

A. I think so.

Q. You are familiar with the manner in which

(Testimony of J. E. Knight.)

lands have been farmed and how the farming has panned out or has not panned out?

A. Yes, I think so.

Q. As a matter of fact you devote your attention almost exclusively to farming and livestock raising and keeping your eye on the land market? [245]

A. Quite a bit that way, yes.

Q. How long have you known the Peter Barceloux home place?

A. I guess I have known it practically ever since I have been here.

Q. Do you distinguish the land, one of the home place and one as the Longmire place,—do you know that that way?

A. I kno the place out south here.

Q. Taking the one south of town where Peter Barceloux used to live and which we have referred to in this proceeding as the home place, how long have you known that place?

A. I guess pretty near ever since I have been here.

Q. Have you been familiar with that land out there during this period of time?

A. I have been on it several times. Of course, I didn't go out on any special appraisement of any kind. I have been out there a time or two,—several times.

Q. You know the lay of the land and how it has been farmed and have been on it several times?

A. Yes.

Q. You have about the same knowledge of that land as you have of lands in this locality generally?

(Testimony of J. E. Knight.)

A. I think so.

Q. Will you state what, in your opinion, is the market value of that home place on the 16th day of August, 1926?

A. Well, that land, as I see it, it's in about three pieces. The way I would judge that would be the west, south and north half of that ranch I would say would be fifty or sixty dollars an acre.

Q. You say 'west, south and north half'? [246]

A. Yes, that particular part of the ranch. What I mean is along the road and on the other road and some on this end.

Q. You mean that they are the lands facing the road on the west, south and north? A. Yes.

Q. You put that at about fifty dollars an acre?

A. About that price. Between fifty and sixty. I consider that the best part of the ranch.

Q. You know about how many acres there are in that part of it do you? A. No, I really don't.

Q. Do you know what proportionate part of the ranch it is, whether one-half of one-fourth of the whole ranch?

A. I would think it would be quite one-half.

Q. What value do you place on the rest of the home place?

A. I think that the land east of the house, part of that is not as good as this, I would say around forty dollars; then there is a piece still further over, just how much of that there is I don't know, I would say fifteen to twenty dollars.

Q. Do you know where with reference to the canal? A. Yes, east of the canal.

(Testimony of J. E. Knight.)

Q. How much do you say that would be?

A. Between fifteen and twenty I should think.

Q. As I understand you, you place fifteen dollars an acre on the land east of the canal and the rest of the land west of the canal—

A. (Interrupting.) I think there is some east of the canal that wouldn't come under that. I think it is a little better [247] land. It would be a small piece of it. I couldn't say just how much.

Q. The lands west of the canal you value at from forty to fifty dollars? A. Fifty to sixty, yes.

Q. This piece east of the house—

A. I wouldn't think that is as good as the other land.

Q. This piece east of the house that you fix at a valuation of fifty dollars an acre, is that part west of the canal? A. Yes.

Q. You place a value of fifteen dollars an acre on the land east of the canal and the land west of the canal would be forty to sixty dollars an acre?

A. Yes.

Q. The acreage you could not state?

A. Oh, I couldn't say as to the acreage.

Q. What value do you place on the Longmire place?

A. I would say the northwest and the southwest part of that would be around fifty or sixty dollars, and there is a piece in the northeast that is nowhere near as good. I don't know how much there is of it.

Q. What is the difference?

A. I would say around thirty or forty dollars an acre, maybe forty dollars an acre.

(Testimony of J. E. Knight.)

Q. What about the rest of it?

A. Fifty or sixty for the rest of it.

Q. Your classification running from thirty to sixty?

A. I would say forty to sixty. Just how much of it I couldn't say. Quite a lot of pot holes in it.

Mr. HUSTON.—That is all." [248]

Cross-examination.

(By Mr. FREEMAN.)

The part of the home place east of the canal is better quality than the piece that lies directly west of the canal. The piece that lies east of the canal there are parts that are better than others but how much I couldn't say and there is quite a lot of poor land in there and some good land too and in my opinion the further you go west the better the land is.

On the Longmire place assuming there are two sections of land just how many acres of that would be placed in the forty dollars an acre class I couldn't say. There may be one hundred and sixty acres in all and I have noticed the land on account of never growing any crop on it. I have reference to the piece of land which is still further over where the swale is on the Fruto road. The land I own on the river is north of the Glenn road and I farm some of it, grow rice, barley and wheat on it and I bought part of that five or six years ago and the rest I have owned about twenty-five years. I do not grow rice on it every year and had it in rice three years and the first year it was a fizzle and

(Testimony of J. E. Knight.)

the next year about twelve thousand and this year a little over eleven thousand on what is called the Troxel ranch. I farm exactly one hundred and fifty-nine acres and I bought the Ball place of eighty acres recently and it is on the highway. I think I bought it ten years ago or it may be two or three years one way or the other, and I have always raised a crop on it and I paid fifty-five dollars for it. I saw the sale of the Snowden ranch in the paper and it said it sold for one hundred dollars an acre and the Snowden ranch is right across the road from the Barceloux home place, part of it is on the same order and part [249] of it is adapted to the same grain crops.

The Snowden place is used for grain but I hardly think that I have seen the same kind of crops on the west end of the Barceloux place as I have on the Snowden place and I think I have seen better crops on the Snowden place and it may be the way it was farmed, but even this year I haven't seen it better than on the Barceloux. I think the Snowden ranch is better than the Barceloux ranch. There is some land that ought to be as good but I have never seen the crops on it that I have seen on the Snowden ranch. [250]

TESTIMONY OF E. E. WILLARD, FOR DEFENDANT PETER BARCELOUX COMPANY.

E. E. WILLARD, after being duly sworn, testified as follows:

(Testimony of E. E. Willard.)

Direct Examination.

(Examined by Mr. HUSTON, One of the Attorneys for Defendant.)

I reside in Glenn County and have resided there since 1916 and have been engaged in farming and livestock and I farm about five thousand acres and grow rice, barley and alfalfa.

Pretty near every bit of the forty-seven hundred acres except one hundred and ten acres is under irrigation, in three different places and some of it lies east of the town of Willows about two miles and some east of that, that is the Peterman ranch and a farm up here northeast of Artois. I have tried to keep informed as to the land situation, sales of lands and condition of the land market but we haven't had any land sales recently.

During my residence here I have kept track of the land market and have been familiar with the condition of agriculture since I came to this county in 1916 and I am acquainted with the Peter Barceloux home place south of Willows, but I have not been on it particularly and I am familiar with it the same as with lands generally around the county and am familiar in a general way with the manner it has been farmed and the kind of crops produced.

As to the market value on the 16th day of August, 1926, I would say it was pretty hard to find a purchaser at all at that time, but taking the whole body of land straight through, about thirty-five dollars an acre. [251]

I have known the Longmire ranch for several

(Testimony of E. E. Willard.)

years and my opinion is that the market value on that land on the 16th day of August, 1926, was forty dollars an acre straight through.

What I meant by my statement was there were no demands for land and one reason for that is, they are not making any money off of the land by farming it, I suppose, and no one wants to buy land when they are not making any money farming. I would say that within the last five or ten years land has been decreasing and since 1920 I judge and never went back and in 1920 we all went broke and the rice business was a failure, not rice alone, but all over the United States and that condition hasn't changed much and there are not any demands at the present time for land.

Cross-examination.

(By Mr. FREEMAN.)

In the last three or four years there would be a small sale but not very much and since the 16th day of August, 1926, the Ellis ranch which is part farming land and pasture land principally pasture and which ranch is about six miles from Willows and located in the foothills was sold, but I don't know how many acres there are. I judge the pasture and farming land are about equally divided. The pasture land is adapted to farming, as far as that goes, but is what I would call pasture land and that is land that is worth more for pasture than it is for farming.

The Ellis ranch was sold at public auction and my sons bought it but I do not know how much

(Testimony of E. E. Willard.)

they paid for it and I do not know of any other sales.

I base my valuation of forty dollars an acre on the Longmire ranch because I have been here since 1914 and I never saw but one or [252] two good crops on that place since I have been here and part of that land over on the northeast corner they never did raise anything. I wouldn't want to buy the Longmire place at all and were I going to buy it I wouldn't pay over forty dollars an acre for it to-day and that is my reason for fixing the market value at forty dollars an acre and I took the home place as a whole and valued it at thirty-five dollars an acre. In the home place there is part of the land that is worth more than the other part and there are twenty-one hundred acres in the home place and there are about three hundred acres east of the canal under the canal that is just such land as they take away from the people here that don't pay their water tax and I would not put the value of the three hundred acres for more than fifteen dollars an acre. The balance of that piece of land is six hundred acres west of the canal, I wouldn't put the value over twenty dollars an acre. The difference between that and the piece that lies east of the canal is that is worth more money on that side because it is better land. It will grow grain over there. As for the other twelve hundred acres I would say forty dollars an acre would be a good price for that and that is all I would pay for it myself and that is the reason that I put that valuation on it.

(Testimony of George A. Barceloux.)

(The auditor and counsel then visited and viewed the home and Longmire ranches of the Peter Barceloux Company and had the sheep counted.)

TESTIMONY OF GEORGE A. BARCELOUX, FOR DEFENDANT (RECALLED).

GEORGE A. BARCELOUX, being recalled by defendant, testified as follows:

(By Mr. BELIEU.)

The garage stock was not sold but the garage business was sold and the money distributed. It was liquidated at that price. [253]

TESTIMONY OF J. D. McDANIELS, FOR PLAINTIFF.

J. D. McDANIELS, after being duly sworn, testified as follows:

Direct Examination.

(Examined by Mr. GEORGE R. FREEMAN, One of the Attorneys for Complainant.)

I live in Willows and have lived there for twenty years and I am engaged in stock-raising and I am in the sheep business and have been in that business steady on and off for the last twenty-five years and I buy and sell sheep. I run on an average of five thousand head of sheep and probably buy and sell that many every year.

This morning I looked at the Barceloux Company's sheep with Tom Sheehy a sheep man from

(Testimony of J. D. Daniels.)

the Fruto district who has been in the sheep business for twenty years.

We first went to the old Peter Barceloux place occupied by Mr. St. Lewis and we counted the sheep there and we found on the old home place,—Mr. St. Louis—three hundred and eighty-nine (389) ewes, good, young, breeding ewes. I put a value of twelve dollars (12.00) a head on them. They are carrying this year forty ewe lambs in the same bunch, at a value of nine dollars ($9.00) a head, and seventy-five old ewes, at a value of three dollars ($3.00) a head, and Sixteen bucks that were pretty old, with a few lamb bucks I put at an average of four dollars ($4.00) a head, making a total valuation of five hundred and twenty (520) head of sheep, five thousand three hundred seventeen ($5,317.00) dollars.

On the other place, under Elmer Barceloux, I have two hundred eighty-four (284) ewes, good, young breeding ewes, these ewes are shown this fall, I put a value of eleven dollars ($11.00) a head on them; thirty old ewes, at a value of three dollars ($3.00) a [254] head, and twenty older ewes of the value of one dollar ($1.00) per head. I will say that in this two hundred and eighty-four head I included two bucks that were there. They were good young bucks and worth as much as the ewes. That makes a total of three hundred and thirty-four head (334) on the Longmire ranch and a total value of all the sheep of eight thousand five hundred and fifty-one dollars ($8,551.00) and the estimate of the sheep on the Longmire place is three thousand two hundred thirty-four dollars ($3,234.-

(Testimony of George R. Freeman.)

00). There has been a difference in the market value of sheep between August 16, 1926, and the present date and the market has been lower and I think a dollar a head more all the way through would be the worth of sheep in 1926, 1927, and 1928 and there was very little variation during these years and our wool and mutton market stayed level. [255]

TESTIMONY OF GEORGE R. FREEMAN, FOR PLAINTIFF.

GEORGE R. FREEMAN, after being duly sworn, testified as follows:

Direct Examination.

(Examined by Mr. HORACE B. WULFF, One of the Attorneys for Complainant.)

I was connected with the Glenn County Garage Company, a corporation, during the years 1926, 1927 and 1928, I think as president thereof and it sold all the property it had and divided the money among the stockholders and if my memory serves me it was eight dollars and eighty-two cents a share or eight hundred and eighty-two dollars for one hundred shares and this capital distribution was made in 1928 and I think that this stock did not have a market value higher or lower than the amount per share distributed on said capital any time during the years 1926, 1927 and 1928 and the average market value of that stock was eight dollars and eighty-two cents a share. [256]

TESTIMONY OF CORA P. GELINAS, FOR DEFENDANT.

CORA P. GELINAS, after being duly sworn, testified as follows:

Direct Examination.

(Examined by Mr. HUSTON, One of the Attorneys for Defendant.)

At the time I took the loan of H. J. Barceloux the indebtedness of H. J. Barceloux at the bank was divided between the Peoples Bank to which he owed six thousand and the United Bank and Trust Company to which he owed seventy-eight hundred and at the time I took over the transaction I was required to and did put up additional collateral to secure the loan and I couldn't have gotten the loan if I hadn't given them additional security. [257]

The foregoing is a statement of evidence before the Master under Equity Rule No. 75.

Dated: February 7, 1931.

W. T. BELIEU,
HUSTON, HUSTON and HUSTON,
Attorneys for Defendant.

It is hereby stipulated that the above and foregoing statement of evidence is a correct statement of the evidence adduced at the trial, and the same may be approved by the Judge without notice.

DEVLIN & DEVLIN & DIEPENBROCK,
GEORGE R. FREEMAN,
H. B. WULFF,
Attorneys for Complainant.

The above and foregoing is a full, true and correct copy of the evidence admitted at the trial of said suit.

Dated: Feb. 12, 1931.

A. F. ST. SURE,
Judge.

[Endorsed]: Filed Feb. 12, 1931. [258]

[Title of Court and Cause.]

AGREED STATEMENT OF EVIDENCE UNDER EQUITY RULE No. 75.

BE IT REMEMBERED that this cause came on regularly for hearing before the Court sitting in equity on the 11th day of March, 1929, upon the bill of complaint and answer of the defendant.

COMPLAINANT'S CASE.

The complainant put in evidence Exhibit No. 1—List of claims against bankrupt. Exhibit No. 3—Stock-book of Peter Barceloux Company. Exhibit No. 4—Copy of pledge agreement. Exhibit No. 5—Minute-book of Peter Barceloux Company. Exhibit No. 11—Findings in the action of Freeman vs. Barceloux and Donohoe. Exhibit No. 12—Claims filed against bankrupt. Exhibit No. 15—Journal of Bankrupt. Exhibit No. 23—Inventory and appraisement in bankruptcy matter. [259]

DEFENDANT'S CASE.

The defendant put in evidence a certified copy of checks from Mrs. Gelinas to Bank Exhibit No. 11.

Exhibit No. 9—Articles of Incorporation of Peter Barceloux Company. Exhibit No. 8—Trust Agreement. Exhibit No. 7—Ledger sheets of Peter Barceloux Company.

The above and foregoing is all the evidence introduced at the trial of the case and all proceedings had on the trial thereof and the following is all the evidence introduced by the complainant and the defendant. [260]

COMPLAINANT'S CASE IN CHIEF.

TESTIMONY OF RICHARD D. BELCHER, FOR PLAINTIFF.

RICHARD D. BELCHER, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. FREEMAN.)

My name is Richard D. Belcher and I am the Referee in Bankruptcy in the Northern District and the Barceloux case was referred to me and I have the record and list of claims filed in the matter here in court.

(The claims were then offered in evidence and were admitted over objection on the part of attorneys for the defendant Peter Barceloux Company, and marked Plaintiff's Exhibit No. 1.)

There were various hearings before me, as Referee, and evidence adduced was transcribed, and I have the typewritten transcripts thereof.

(Said transcripts were identified and marked Plaintiff's Exhibit No. 2 for identification.)

(No cross-examination.) [261]

TESTIMONY OF GEORGIE McLOUGHLIN, FOR PLAINTIFF.

GEORGIE McLOUGHLIN, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. FREEMAN.)

I was court reporter for Referee Belcher during the hearing before him in the matter of H. J. Barceloux, a bankrupt, and I took down and transcribed the testimony of the various witnesses. I identify these transcripts shown to me and marked Plaintiff's Exhibit No. 2 for Identification, as the transcripts of the hearings of July 12, 1927; July 22, 1927; June 13, 1927; May 17, 1927; December 10, 1927; March 14, 1927, and June 27, 1928. All of these transcripts contain a true and correct statement of the testimony adduced at the various hearings.

(No cross-examination.) [262]

TESTIMONY OF GEORGE BARCELOUX, FOR COMPLAINANT.

GEORGE BARCELOUX, after being duly sworn, testified as follows:

Direct Examination.

(Examined by GEORGE R. FREEMAN, One of the Attorneys for Complainant.)

I have resided in Orland for twenty-one or twenty-two years and I am a stockholder of the

(Testimony of Georgie Barceloux.)

Peter Barceloux Company, a corporation, and which Company was formed in 1912 by my father and mother and at the time of the organization of the corporation Henry Barceloux, my brother and Cora Gelinas, my sister, were the stockholders and Henry Barceloux is the bankrupt in these proceedings. There were 10,000 shares of stock in the corporation, one-third of which was held by Henry, one-third by Cora, my sister, and one-third by myself and one-third held in trust by Cora, Henry and myself for the three nephews—I mean fourths, and the stock was all isued and my nephews became the holders of one-fourth of the stock subsequently, and at the time of these proceedings the stock was held in four equal shares by myself, Henry, my sister and the other quarter for the nephews.

I was president of the corporation the latter part of 1926, and prior to that Henry was and I think I became president in 1926, in July and prior to that time Henry was president and Henry had been president of the corporation since 1912 and prior to becoming president I was vice-president and my sister was secretary and treasurer and commencing with the year 1926, Fred Gelinas kept the books, the husband of my sister, and I think he quit keeping them in 1922, but I think Knowles made the physical entries in the book and [263] the corporation proper and the management thereof was in charge of the director and Mr. Henry Barceloux was not the managing director at any time. The office records were kept in Willows and Fred Gelinas had them for a while and then Henry had

(Testimony of George Barceloux.)

them for a while, and when Fred Gelinas quit keeping the books, Henry made and had the records. I could not say, he kept them in his own office—I don't know exactly and from the time that Fred Gelinas quit keeping the books until I became president all of us collected the moneys due the corporation and I can't say that one collected it all, any money that was collected by us went into Henry Barceloux's office and through the books and we held our meetings in his office and sometimes in my sister's store, and when we needed the corporation records between 1923 and 1926 we got the records sometimes in the Glenn County Bank and sometimes in his office—Henry was at that time an officer of the Glenn County Bank and had his office in the same building and as early as 1923 there were financial transactions between Henry Barceloux and the corporation and Henry Barceloux commenced to borrow money from the corporation about 1912 or 1913 and he did not repay all of those moneys prior to 1923 and there was indebtedness from Henry Barceloux to the corporation as early as 1912 and Henry and myself borrowed money from the corporation jointly as early as 1923.

As to whether the corporation had any security for the money that Henry borrowed as early as 1912, I could not tell you that. I might explain that because father as long as he was living ran the business and I could not say whether father got security or not from him. My father died December 14, 1918, and after December 14, 1918, Henry borrowed money from the corporation and as for se-

(Testimony of George Barceloux.)

curity for the money he gave his certificate of stock of the corporation for 2,499 shares, and 75 shares of Pacific National Insurance [264] Company stock and also 9 shares of Bank of Orland, and something else which I don't recall right now, the records will show.

Henry borrowed money from the corporation after the death of my father and Henry owed money to the corporation in 1919.

"Q. He did as early as 1919. Did he as early as 1919 give any security to the corporation?

A. I don't know whether there was any of it in 1919.

Q. Will your books show whether or not as early as 1919 you obtained any security, or do you know without your books?

A. As near as I know, I don't believe there was in 1919.

Q. There was not any. When was the first time, if you recall, Mr. Barceloux, there was any security for any of the indebtedness of Henry Barceloux to the corporation?

A. 1921 or 1922, somewhere around there.

Q. 1921 or 1922. What security did he give at that time, to your knowledge?

A. A certificate of the Peter Barceloux Company.

Q. What numbered certificate?

A. Well, it was the first certificate issued to him.

Q. Have you the stock-book with you? A. Yes.

Q. Will you produce it? A. Yes.

Q. Take your corporation books with you, will you please?

(Testimony of George Barceloux.)

The COURT.—Proceed, proceed.

Mr. FREEMAN.—Q. Now, what date was it, if you can tell from that book, that you had any security from Henry Barceloux?

A. I don't think I can tell from the book.

Q. What certificate; can you tell from that book the certificate number it was that was given as security? A. I think it was Certificate No. 5. [265]

Q. May I see the book, please. Certificate No. 5 was issued on the 5th day of October, 1912, to H. J. Barceloux for 2,499 shares. Now, at the time that the security was given of this stock, how was it given, Mr. Barceloux? A. Just what do you mean?

Q. Just what I say; how was it given? Did you have any writing from him of any kind?

A. Not when it was first put out; that was not my understanding, when it was first up.

Q. You say—

A. First held for security, put up for security.

Q. When it was first held as security, what was done with the stock physically?

A. It was held by the corporation.

Q. Where? A. In Willows.

Q. In Willows. In Henry Barceloux's office, wasn't it?

I could not tell you that exactly.

Q. Did Henry Barceloux have possession of that stock-book the first time that you say that stock was put up for security?

(Testimony of George Barceloux.)

A. I could not tell you that. It was either him or my sister or Mr. Gelinas.

Q. As a matter of fact, Mr. Barceloux, that book was in his possession all the time, was it not, up to the time you became president? A. No, sir.

Q. It was not? A. No, sir.

Q. Where was it in the interim?

A. I told you at the beginning my brother-in-law was keeping the books, and my father—they were living with father and mother, and they had possession of those books from the beginning.

Mr. FREEMAN.—I will withdraw that question and ask [266] you this question. From the time that your brother-in-law or after your brother-in-law quit keeping the books and Henry kept the books, or had them in his charge, did anybody else other than Henry have any of the books of the corporation? A. Might have, yes.

Q. Did they? A. Might have; I could not say.

Q. Do you know definitely whether they did or not? A. I could not say exactly that; no."

On February 6, 1923, Henry Barceloux owed the corporation about $2,000.00 on an open note, dated April 27, 1922, and as near as I can recall was a one day note, and I think there was some open accounts but I cannot tell you exactly and I do not remember how much. I might explain it this way that all the stockholders were borrowing money from the corporation as we needed it and at intervals we owed money on an open account and at other times we would give notes and I remember borrowing money

(Testimony of George Barceloux.)

when father was handling this practically, and I think I was a borrower from the corporation as early as 1923, and Henry and myself were jointly indebted to the corporation February 6, 1923, and the corporation did not have any security from me therefor, but the corporation had security from Henry and had this Certificate No. 5, and I don't recall whether or not it was in his possession or in their possession.

I owed the corporation on February 6, 1923, $1,750.00 on a note, a joint note, Henry and I, and we were indebted together to the corporation in the sum of $3,500.00, my half was $1,750.00.

"The WITNESS.—On February 6th, 1923.

Mr. FREEMAN.—Q. That is the date of the endorsement on this Certificate No. 5. Now, do you recall at this time, Mr. Barceloux, that security was given by Henry Barceloux?

A. I know that security was given by him, [267] but I don't mean to say at this time it was held prior to that time. If I recall right, he just made a blank endorsement, and the date was filled in about that time. I don't know the exact time.

Q. Do you know whether or not prior to February 6th, 1923, the corporation had any security from Henry Barceloux? A. Yes.

Q. What did they have? A. That certificate.

Q. This certificate? A. Yes.

Q. And who held it for the company at that time?

A. The corporation held it.

(Testimony of George Barceloux.)

Q. Who was the representative and custodian of the stock at that time for the company?

A. My brother-in-law was dead at that time, Henry was.

Q. Your brother-in-law was dead in February, 1923, wasn't he?

A. I could not say; I do not recall the date.

Q. Assuming your brother-in-law was not dead; after his death all the papers went to Henry?

A. I cannot say all of them.

Q. This particular share of stock, Mr. Barceloux, was in the hands of Henry Barceloux all the time, wasn't it, up to the time it was delivered to you in July, 1926? A. From what time?

Q. From the time of its endorsement, February 6th, 1923. A. I think so.

Q. Yes. You know it, don't you?

A. No, I don't know it. There is a distinction. I want to make this clear, we have got nothing to hide—"

I testified at the bankrupt hearing on July 12, before [268] Richard Belcher and I perhaps testified "Why, yes we had these endorsed certificates endorsed by his name on the back and he held them as collateral for the company, and he was the custodian of the company."

(The stock-book of Peter Barceloux Company was introduced in evidence and marked Plaintiff's Exhibit No. 3.)

I don't know how long the endorsement remained on the certificate. Later on we got more

(Testimony of George Barceloux.)

certificates as security and we had a pledge agreement which we made him give us on April 27th, 1926, and the last I saw of the pledge agreement was in Judge Belcher's court in Marysville. We had been insisting on Henry to make us a pledge agreement and on that day the company held a meeting and we got that agreement that day, and all the corporation had in 1923 to April 27, 1926, was this one certificate of stock and our reason for getting that pledge agreement, we just wanted it more explicit—well stipulating what security was up and stipulating what security we had.

(Photostatic copy of the pledge agreement dated April 27, 1926, was introduced in evidence and marked Plaintiff's Exhibit No. 4.)

At the time we obtained the pledged agreement from Henry as to whether I had knowledge of Henry's indebtedness to the estate of Frank Freeman, deceased, I will have to explain and will have to answer it both ways and I did and I did not. I understood—I knew there had been a judgment all right, but I understood that you (Mr. Freeman) and Henry Barceloux had agreed to work together on that judgment and I knew the judgment was approximately 40 or 42 thousand dollars, and I know that at one time, he Henry Barceloux paid you (Mr. Freeman) over 3 thousand. But that had nothing to do with our obtaining the so-called pledged agreement. [269]

"Q. Referring to your testimony given on June

(Testimony of George Barceloux.)

13th before the referee in bankruptcy in questioning about this agreement of April 27th—

The COURT.—Proceed, proceed.

Mr. FREEMAN.—(Reading:) 'Q. Can you give me an approximate idea of about how long it was after you made that demand that this was delivered by Henry Barceloux?

The REFEREE.—When you say "this," what do you mean?

Mr. FREEMAN.—This assignment, of which I have a copy dated April 27th, 1926.

A. I think it was about 60 days before we finally got it.

Q. Did he personally hand it to you?

A. I told you a while ago I don't know whether he did.

Q. How do you know it was 60 days?

A. Because I know it took us a little while before we got it. We became suspicious. We were missing some money and we realized the cash account was diminishing rapidly and he finally came for $3,000 to give you, and that was the limit.'

Mr. FREEMAN.—Q. Did you give that testimony?

A. Yes.

Q. When you say 'yes,' that was in answer to my question; you had reference to mine, did you?

A. Yes."

That is not the reason that we got the pledge agreement not all together, it might have been part of the reason.

(Testimony of George Barceloux.)

"Q. The pledge agreement, Mr. Barceloux, describes in it Certificate No. 5 for 2,499 shares of stock as security for a note for $24,064.48 due one day after date, dated June 17th, 1925; one for $3,500, due one day after date, dated February 6th, 1923; one for $2,000, due one day after [270] date, dated April 27th, 1926. At that time, that was all the indebtedness of Henry Barceloux to the company, wasn't it?

The COURT.—Answer it.

The WITNESS.—A. I think there was a little open account he and I, a joint open book account of he and I.

Mr. FREEMAN.—Q. Had you checked that open book account? A. In the book.

Q. You knew the amount of it at that time?

A. The book showed it."

I don't know where the agreement was made. It was executed in my sister's store, office in the store in Willows, and Henry, Cora and myself, directors of the corporation, were present. I don't know whether there was any meeting of the [271] corporation that day. The records show that there was a meeting on April 27th, 1926, and the three directors were present at the meeting and the purpose of the meeting was not to take up the matter of the pledge agreement exactly but there were other matters came up for discussion, and resolutions passed.

(The minute-book of Peter Barceloux Company, a corporation, was introduced in evidence, and marked Plaintiff's Exhibit No. 5.)

(Testimony of George Barceloux.)

This agreement we had been after Henry for several months to produce it and on that day he brought it over, and the agreement when produced had already been typewritten. The part filled in with ink Henry did himself in my presence.

At that time I checked the books of the corporation as to these particular amounts because I knew of them. I think that the $3,500.00 item is a joint note of Henry and myself dated February 6th, 1923.

"Q. How much, if you know, was the open account indebtedness of Henry Barceloux to the corporation on the date this pledge agreement was made?

A. Something like 1700 dollars and something.

Q. $1,700? A. His half, yes."

Other than the things mentioned in here and the $1,700.00 I just mentioned, I think that was all the indebtedness.

"Q. The minutes showing you were not present on the date, is there a question in your mind as to the date, the proper date of that agreement?

A. No, not to the date, because I was present when he delivered that, because I was right by him when he filled it in.

Q. Now, there is nothing in that—look at that. That shows you were absent.

The COURT.—What? [272]

Mr. FREEMAN.—I am showing him the minutes to show he was absent.

The COURT.—He has not disputed it. Treat it

(Testimony of George Barceloux.)

as a fact until somebody disputes it. That is, I say he has not disputed the book shows that."

I think after April 27, 1926, and I feel pretty sure it was after that date that we had Henry Barceloux give that additional security and I think that is when we got those 75 shares of the National Fire Insurance, 9 shares of the Bank of Orland and Glenn County Garage Certificate of 100 shares. We did not get anything in writing other than the stocks endorsed and handed over to me and that at the time he delivered that other security he was President of the Corporation.

"Mr. FREEMAN.—I am asking you, when he gave you additional security, did he give you anything, too, at the time; you, personally?

A. No, not me, personally.

Q. He did not. This Certificate No. 5 which has been introduced here in evidence, and this endorsement on it, this certificate is pledged to the Peter Barceloux Company, a corporation, to hold by such company as pledgee for H. J. Barceloux as security for payment of following notes: One dated June 17th, 1925, for $24,064.48; one dated February 6th, 1923, $3,500; and one dated April 27th, 1926, for $2,000, and as security for prior and future loans said certificate being number 5, and being for 2,499 shares of corporate stock of said corporation, and being pledged to said Peter Barceloux Company by H. J. Barceloux upon each of the days and dates of the above-mentioned notes. When was that written on there? [273]

(Testimony of George Barceloux.)

A. Did you say that is on the certificate?

Q. I did. When was that put on there?

A. I don't know exactly.

Q. It was put on there, wasn't it, Mr. Barceloux, on the date of the pledge agreement?

A. No, sir, I cannot say that; I don't know exactly.

Q. Who wrote it on there?

A. That is Henry's writing.

Q. That is Henry's writing. Did you see it written?

A. I cannot say I have seen it written; I say it there, I knew it was there.

Q. When was the first time you recollect having seen it?

A. I think around the date of that pledge agreement; I think so.

Q. Now, on July 12th, on page 50 Mr. Belieu, referring to that same endorsement, Mr. Barceloux, I asked you this question—I will ask you whether or not this question was asked and you gave this answer:

"Q. Now, on the 27th of April, Mr. Barceloux, was that endorsement made on that date, or made prior to that time?

"Mr. BELIEU.—What do you refer to?

Mr. FREEMAN.—Q. The endorsement on Certificate No 5.

A. Made that day.

Q. That very day? A. Yes.

Q. Then prior to that item, prior to April 27th,

(Testimony of George Barceloux.)

1926, if that is the date of the execution of this document, you had nothing from Henry Barceloux as security?

A. Why, yes. We had these endorsed certificates, endorsed by his name on the back, and he held them as collateral for the company.

Q. In his own possession, did he? [274]

A. Yes. He was the custodian of the company."

Mr. FREEMAN.—Q. Does that refresh your memory as to when that was written? A. No.

Q. It does not? A. Not exactly.

Q. But you gave this statement before the referee, did you not? A. Yes."

"Q. Now, then, when Henry signed that on the 27th day of April, 1926, what became of it?

A. Signed what?

Q. That pledge agreement of April 27th, 1926.

A. It remained with the note and certificate.

Q. It remained with the note and certificate?

A. Yes.

Q. You mean the note? A. Yes.

Q. Who had those notes and that certificate?

A. The company had them.

Q. The company had them, and Henry was the custodian of the company, wasn't he, at that time?

A. Well, he had the books, yes.

Q. And he took the pledge agreement and had all the notes in his possession, in his office at that time?

A. I imagine he did, unless my sister had some."

Subsequent to that time I obtained some other certificates of stock, but don't recall the exact date.

(Testimony of George Barceloux.)

I was present when the agreement was made for a subsequent pledge and I don't recall whether that particular instance was in Willows or in Orland, but I was present all right because I was familiar with the discussion and I was insisting on it because the minority stockholders wanted some security.

At the time of this conference Henry and Cora, my sister were present and when I mention minority stockholders [275] I mean the three nephews. They had nothing to do with the operation of this corporation and were not officers, and they wanted more security and that we should get more security. Some of them knew at that time what security I had—Elmer did, and Cora and I discussed it with Elmer several times, but whether it was Orland or in Willows we discussed the further security, I do not know, but I know the three were present and it was agreed on, and I don't know whether it was a meeting of the corporation—that you would call it a meeting. We were representing the coporation—we were talking about the interest of the corporation, and I don't know whether you would call it a meeting—there were no minutes kept. There was no corporate action taken and he agreed to give some additional security and there were not any written agreements.

At the time of the conference with Henry Barceloux looking toward additional security I am pretty sure he had other encumbered property—I could not say—I imagine that he had—I don't know—Henry had a lot of property, and it is my under-

(Testimony of George Barceloux.)

standing he had other encumbered property which I understood from general observation and general contact with him. I was a director of the Bank of Orland and I knew he had that stock and I knew he had the Pacific Fire National Insurance stock because George Cartwright, the president of the corporation, had been up there several times with him in order to try to place an agency in that company in our hands. I knew about the Glenn County Garage stock and I asked him what he had—he recited it and we agreed to take it. We asked him what he had and he told these things and we agreed to those as additional security and nothing further was done.

The physical certificates of these corporations were not physically present that day. I might have seen [276] them on this day and I seen all those certificates when the books were turned over to me in July, 1926. I could not say the exact date, but I think it was before July, 1928.

"Mr. FREEMAN.—The 28th day of July, 1926, is that the date Henry resigned as president?

A. If the minutes show that it is; I can't recall.

Q. Yes, Mr. Barceloux presented his resignation as president of the board of directors. Why did he resign that day?

A. Well, he did not want to take any more interest in the corporation.

Q. Why? A. I don't know.

Q. What happened prior to that time to call for his resignation? A. We never called for it.

(Testimony of George Barceloux.)

Q. You did not ask for it? A. No.

Q. You were perfectly satisfied with Henry up to that time as president?

A. Well, yes; we did not object to him being president.

Q. You did not object to him being president?

A. No.

Q. Did you make any objection to him being in charge and in custody of the books and records of the corporation?

A. Well, I will tell you why; mother wanted me to keep the books, and we figured she has not quite an interest in that corporation.

Q. Was there anything else that actuated you in wanting his resignation?

A. No, sir, nothing else.

Q. Nothing at all? A. No."

Prior to that time I had seen said stock certificate of Pacific National, Glenn County Garage Company, perhaps several times and the Bank of Orland Certificate I had to sign when it was issued [277] and I was bound to see it at the time it was issued.

On the date he gave those three additional stock certificates he did not give anything in writing. I have got a statement, a balance sheet of the financial condition of the Peter Barceloux Company in April, 1926. We issue a statement [278] taken from our books—we issue one every year. I didn't bring a statement issued on the 1st day of January, 1926—I brought the books and the books will not show a balance sheet for that year because that is always

(Testimony of George Barceloux.)

made on a typewritten sheet. We furnished my three nephews statements and we furnished them a stockholder's report once a year. Such a statement was introduced in the action commenced by my three nephews against the corporation, my sister and myself.

I have been more or less familiar all the time with the business and the statement for the twelve months ending December 31st, 1925, you show me, but cannot identify that as a statement from our books and I could not identify that without taking the books, or taking each item and going back to that date.

The statement you show me dated December 31st, 1925, and the one ending September 7th, 1927, I cannot identify these accounts from the book in my mind in comparing them.

I think No. 12 Certificate of the Peter Barceloux Company was issued to H. J. Barceloux on June 29th, 1906, and the certificate was issued at that time in order to make the Peter Barceloux Company appear as pledgee on that. The issuance of that stock on that date occurred in my mind when your father, Scarce and Donohoe borrowed money from the Tehama County Bank several years before I first went into the Bank of Orland and they had borrowed up there, and their certificate was issued in that way and that came to my mind at the time. I cannot say when it first came to my mind and there was not any other particular reason, and I don't know that I knew that you were asking for security on the $58,000.00 judgment, be-

(Testimony of George Barceloux.)

cause I understood you and he were all agreeable, and I cannot say that the actuating reason for getting Certificate No. 12 issued was Mr. Freeman's [279] asking for security on the $58,000.00 judgment.

"Q. I refer you to July 12th, the meeting before the referee on July 12th, page 40—page 41: (Reading:) Q. Why was not the transfer made at that time? A. I don't know why. I just figured that that certificate was all right as it was, without having one issued to Peter Barceloux Company as pledgee. Q. What happened between the 27th day of April, 1926, and the 29th day of June, 1926, that actuated you to have Certificate No. 12 issued? A. On account of his connection with you, we got suspicious and we though it might give us better protection if the word "pledgee" was on there. Q. You mean to have the word "pledgee" put on the certificate of stock? A. Yes. Q. What happened between the 27th day of April, 1926, and the 29th day of June that actuated you to have it issued? A. Well, I had heard that you had got a trust agreement for deed of trust recorded on that Lake County Ranch, and got suspicious that if you had that done you had induced Henry to break that escrow agreement I had and record that, or otherwise you could not have that deed of trust on record. Q. Was there any other reason? A. Yes, several other reasons. Q. What are they? A. Henry had been helping himself to money of the company and they were dissatisfied with him, and we understood you got quite a bit of money from

(Testimony of George Barceloux.)

him. Q. When did you first know he had been helping himself to money? A. About a year and a half ago. Q. Notwithstanding that, you did not have any transfer made until the 29th of June. Is there any other reason for the transfer of June 29th? A. No other reason.'

Did you give those answers? A. Yes." [280]

I could not say that I knew Henry had made an assignment to you of his stock in the Peter Barceloux Company and as administrator and as security on the 29th day of June—I found out after that time—I don't know whether prior or after. At the time Certificate No. 12 was issued I, Henry and my sister Cora were present and Phil. Ware was not there. No one else was there unless her attorney, Mr. Johnson. I went to the office of Phil. Ware on the instigation of my sister and she asked me to go. At that time I did not discuss the proposition of Henry giving an assignment to you (Freeman) as administrator of this stock, and it was not discussed in my presence. I knew there was such an assignment made as I told you before from the notice you served on us and wanted us to sign. I don't know how the notice was worded and whether it was worded to the effect that Henry had assigned to you his stock in the Peter Barceloux Company, but I know you served the notice on us and further to sign an agreement there that we would not sign, but as to the date I could not say, and we refused to execute it—I could not call a meeting without notifying them. I think the agreement you wanted us to sign, wanted me to give the

(Testimony of George Barceloux.)

notice before I made any pledged sale under our pledge.

On July 28th, 1926, Henry resigned as president and I became president.

A notice of the sale of the stock under our pledge was given and I took corporate action looking to that result, and I don't know the exact date.

We decided to sell Henry's stock on the 5th day of August because the minority stockholders figured we had loaned him enough money and we should clean up if he could not pay, and they wanted that prior to Henry's resignation and the 5th day of August. I don't [281] know why it was not done sooner and Elmer was the main minority stockholder and the one we call Babe, Ernest, spoke to me about the matter, and Elmer Barceloux asked me to sell the security prior to that meeting and they were dissatisfied in the spring of 1926.

At the time Henry endorsed Certificate No. 12 there was not any discussion with him about selling the secured property and none on the 28th day of July, after Henry resigned as president. I think the secured stock was sold on the 16th of August and the notice of the sale was handled by the attorney and I did not give you personal notice thereof, and the sale was made according to law from my understanding, and on the day of the sale we went there and my sister read a certain paper there and called for bids, and I bidded in for the corporation and that is the substance of it. Tim Belieu, my sister and myself were there. Attorney I. Zumwalt probably was not there. And when I

(Testimony of George Barceloux.)

say Tim Belieu I mean my attorney. When I went to the courthouse stairs to make the sale, she read, I don't know what you call it—a certain notice there and called for bids and nobody bid but myself. She asked if there was anybody to bid and called it three times, I think, and I bid the amount he owed us. We sold the stock No. 12 and the National Certificate and the two Garage Certificates and two certificates of stock of the Bank of Orland. I think the property was offered as an entirety and there was one bid for the whole amount. The amount will show I think what he owed $35,000.00 or $36,000.00. I don't know exactly. The minutes of the corporation for the 28th day of July, 5th day of August and the 16th day of August, and the records will show that at that time we sold the 2,499 shares of capital stock of the Peter Barceloux Company, 75 shares of Pacific National Fire Insurance, 9 shares of the capital stock of the Bank of Orland, [282] 100 shares of Glenn County Garage for the sum of $35,814.41 plus $500.00 attorney's fees in payment of these obligations, viz.: the $24,000.00 note, the $2,000.00 note, half interest in $1,000.00 note, half interest in the $3,500.00 note and half of a book account of $1,700.00, and part of a payment of the Cartenberg contract plus interest.

The $1,800.00 assignment mentioned is on the Cartenberg account and that indebtedness was according to an agreement that father, Henry and Donohoe went in together and bought a section of land north of Willows, and Henry took title in his

(Testimony of George Barceloux.)

name. Father had one-third interest in there and Henry sold the property, as much of it as he could, and gave an accounting of it, and that is why we figured Henry still owed money due the corporation. That all went to the corporation when the corporation was made, and that was the amount Henry—father's part, or the corporation's part that was coming from Henry at that time, plus some interest.

Peter Barceloux turned over this assignment, and all other assets at the time of the incorporation, and when I say turned over I mean father and mother formed a corporation and they turned over all the personal property and the real property to the corporation for a trust, in a trust agreement from the corporation that either one of them as long as they lived would get all the returns of that corporation.

The real property was conveyed to the corporation and some of the personal property was assigned over by assignment like mortgages and others, they just turned them over physically.

"Q. Was there any written agreement between your father and the corporation as to his interest in the Cartenberg land?

A. Well, that contract itself.

Q. What contract?

A. The contract between Henry and [283] father.

Q. Have you the contract? A. Yes.

Mr. BELIEU.—We have it here.

Mr. FREEMAN.—Q. Now, you say 'a contract';

(Testimony of George Barceloux.)

when you say 'that contract,' Mr. Barceloux, you refer to an agreement dated on the 2d day of September, 1910, between H. J. Barceloux, on one part, and Charles L. Donohoe and Peter Barceloux on the other part, and that is the agreement you mean?

A. Yes, that is the one we entitled: 'The Cartenburt Land Agreement.'

Q. You are familiar with this? A. Yes.

Q. It described certain property and states Henry Barceloux has title to the land for the benefit of all three of them in equal shares? A. Yes.

Q. How was that interest transferred to the Peter Barceloux Company?

A. Just by being turned over.

Q. You mean by that this instrument itself was delivered by your father to the corporation?

A. Yes.

Q. All right, when? A. 1912."

Father was operating the corporation then and we felt we owed him the courtesy to let him run it, and up until 1918, he operated it and managed it.

Whether the Cartenberg tract was being sold by the Sacramento Valley Realty Company, a corporation, I don't know and we were looking to Henry on that.

When we collected this $1,800.00 from Henry for the sale of his assets on the 10th day of January, $830.00 was collected as interest. Henry agreed to pay interest on it and Henry agreed that he owed that much and was willing to pay interest and made such [284] agreement with the company, and who represented the company I don't know; that

(Testimony of George Barceloux.)

was agreed, discussed several times; it was a verbal agreement with Henry and the corporation. The first time Henry was present when it was taken up and was one party in that contract and was President of the Corporation at the time and it was agreed he would pay interest on the back money he had collected and did not turn in.

Henry talked to my sister and to myself two or three times, and I cannot name the dates and I had nothing to do with it at the date of the sale and the first time might have been two or three days prior to the sale.

"Q. For what period did he agree to pay interest?

A. Well, he said he had that money collected away back in 1917. He said about that much money was due the corporation. I said, 'yes.' And he said he had collected and had accounted for that as far back as 1917 or 1918, something like that.

Q. Did you figure the interest up for which this sale was partly made? A. Yes.

Q. $830.00. What interest did you figure?

A. I figured seven per cent straight interest.

Q. For how long?

A. I think five years and something; five or six years.

Q. Was there any agreement to pay interest for that long?

A. Well, I figured the date where he first agreed that he owed that money and had not turned it back

(Testimony of George Barceloux.)

was the date that he should be charged interest, and if he did not want to pay he could object to it in the sale.

Q. On April 27th, Mr. Barceloux, 1926, when you got the pledge agreement, you knew all about that Cartenberg transaction, [285] didn't you?

A. Yes."

I did not check upon the books as requested by you as to the values of the stock of the corporation in September, 1927, as I did not understand that you wanted it and that takes quite awhile. I know the biggest part of the properties owned by the corporation in April and August, 1926, and the corporation owned what is known as the Home Ranch consisting of 2,184 acres and the improvements on it were carried separately in our books. The company also owned the Longmire Ranch of 1,240 acres, this building in Willows, the home in Willows occupied by my mother at the present time and 40 acres known as the Blakely land, a house known as the Florence House, some vacant lots in north Willows in the Cartenberg Addition which I think has been sold to Pickett, the Dunlap land, 84 shares of the Bank of Orland, 35 shares of United Bank & Trust Company, 11⅔ Certificates of United Bank & Trust Company, 75 shares of Pacific Mutual Fire Insurance Company stock. Those things were all prior to the sale of the Henry Barceloux stock.

The assignment of $1,700.00 connected with the sale was an open account of long standing and some of it back in the Spring of 1923, and was a

(Testimony of George Barceloux.)

joint account between Henry and myself. The total amount was a little better than $3,400.00.

The corporation also owned a garage in Willows. We sold all the property as shown by the minutes of the corporation of August 5, 1926.

After the sale was made to the Peter Barceloux Company as stated in the minute-book, the corporation sold the stock to me, on September 1st, 1926. When the sale was authorized I was in Willows, but took no part in the meeting. I did not attend the meeting.

I testified that on April 27, 1926, the date that the [286] pledge agreement was made there was a discussion as to all Henry's liabilities to the Barceloux Company and I knew pretty well at that time what the liabilities were, and I think all of Henry's obligations were put in at the time.

(The following questions were propounded by Mr. Freeman to George Barceloux and the following responses of Mr. George Barceloux thereto are as follows:)

"Q. Now, then, when you made this sale, as a matter of fact, they were not all put in, were they? The $1,800 was not in there was it; the $1,700 was not in there?

A. I believe not the 1,800—the 1,700 have you reference to?

Q. I am talking about the open accounts you mentioned.

A. No, not the open account, was not put in.

Q. It was not put in?

A. Not the open account.

(Testimony of George Barceloux.)

Q. And the $1,800 was not put in? A. No.

Q. At the time you made this sale did you give any publicity to that sale, or just content yourself or the corporation with giving the legal notice?

A. I gave the legal notice and pasted one on the post right in front of your office and one in front of the postoffice and one in front of the courthouse.

Q. Now, Mr. Barceloux, the question was, did you give any publicity to it other than the posting of notices? A. I don't know what you mean.

Q. Did you put it in the paper that you were going to sell the stock? A. I think so.

Mr. NAPTON.—We object, for the reason he did not have to.

The COURT.—He has answered it.

Mr. FREEMAN.—Q. Did you tell anybody the sale was going [287] to be made?

Mr. NAPTON.—Same objection.

The COURT.—He may answer it; overruled.

The WITNESS.—Yes, I told somebody; I cannot say I did not.

Mr. FREEMAN.—Q. Who did you tell?

A. I know there were discussions at times with different people, and it was mentioned.

Q. You cannot name any person to whom you gave notice that that sale was going to be made, personally? A. No, I could not now.

Q. Now, at the time you made the sale, Mr. Barceloux, you were the President of the Bank of Orland? A. Yes."

I cannot tell exactly what the book value was of

(Testimony of George Barceloux.)

the 9 shares of Bank of Orland stock. A few shares of the Bank of Orland were sold or changed hands at $90.00 a share during the year 1926. Since the corporation purchased the Glenn County Garage stock it has been sold, you (Freeman) bought it for $8.82 a share and the Pacific National Fire Insurance stock has not been sold and we paid an assessment on it, and it is my understanding that the Bank of Italy took it over. We paid an assessment of $3,000.00 on the 75 shares and we were not offered anything for it at that time that I remember of. [288]

Cross-examination.

(By Mr. BE'.IEU.)

In a general way I was acquainted with the operations of my brother Henry during the years prior to April, 1926, and the scope of his operations were large.

"Q. Consisting of what?

A. A lot of land, and had a lot of interest in land, and he was interested in companies, had bank stock, and raised a lot of rice.

Q. In round numbers; could you give the court some idea as to the acreage in which he was interested, in round numbers?

A. You mean interested in the way of ownership?

Q. Either involved as a matter of interest, as a stockholder in a corporation.

A. And as a renter, too?

Q. Yes.

(Testimony of George Barceloux.)

Mr. FREEMAN.—I object on the ground it calls for hearsay.

Mr. BELIEU.—He can testify if he knows.

The COURT.—Well, just a moment. I think he may answer it and the court will take into consideration the fact all attempts to detail other persons' ownership will be more or less hearsay.

The WITNESS.—A. His interest in land was in thousands of acres, I know that."

He was interested in a couple of banks—three banks, I think, and was president of the Glenn County Savings and I think he was vice-president at that time of the Bank of Orland. He had been vice-president of the Bank of Orland, I guess, 19 years and the Glenn County Bank from its organization. It was in 1910 or 11, I think. He was either president or vice-president all of the time of the Glenn County Bank and carried on a large real estate business in Willows. [289]

I am acquainted with the items that went to make up these respective notes given by Henry Barceloux to the Peter Barceloux Company on the dates indicated in this pledge agreement and they are the items which I have testified to here on examination by Mr. Freeman.

The item of the note of $20,000.00 is to be found in the ledger, an open account and that was the balance due by him to the Company at that time, so we put it in, and a note, noticed, carrying it in an open account. The page on the book of the Peter Barceloux Company of the account which went to

(Testimony of George Barceloux.)

make up the $24,000.00 obligation is a loose leaf system—page 2 or page 3—ledger account. Those entries I think some of these were kept by Fred Gelinas, and he was my sister's husband and she being the secretary he was keeping the books for her, and the items made up were for money that he got—moneys advanced to him by the corporation. The items are all contained in the three pages that I have called the court's attention to and the note is contained in the second page. The account started as of December 31st, 1922, but that is carried over from—apparently carried over from the other book you know and it went on down and clean up to the time we took the note for the balance of the account which was June 17, 1925,—$24,064.48 and the note was executed and was for an open account in June 1925.

(The ledger sheet of Peter Barceloux Company containing the items that went to make up the $24,000.00 note was introduced in evidence and marked Defendant's Exhibit No. 7.)

These ledger sheets contain all the money or advances that went into this large note.

The obligation indicated in the minutes of date [290] August 6, 1926, of $1,750.00 testified to as a note held by Peter Barceloux Company and signed jointly by myself and Henry my brother, on February 6, 1923, is an entry on the bills receivable account and was money got—the actual cash.

The record in the bills receivable account—ledger Peter Barceloux Company, February 6, 1923, is

(Testimony of George Barceloux.)

H. J. and G. A. Barceloux $3500.00 note and that is the note we gave the corporation for money, actual cash.

The note given on February 27, 1922, by H. J. Barceloux for $2,000.00 and it outlawed on February 27, 1926, and that there note we held was a renewal of this original obligation, and the renewal was made before it was outlawed. That is one of the notes which was secured by the stock and represented actual cash advances to Henry Barceloux.

The obligation of date January 3, 1923, for $1,000.00 being one-half of the note executed by myself and brother Henry to the Peter Barceloux Company was the note given by Henry and I, and we got that money in two separate items; that is we got $1,000.00 one day and the other $1,000.00 another day.

As shown by the corporation books we got the first $1,000.00 on January 1, 1923, and a few days later on December 16th we got the second thousand, actual cash.

In the minutes passed by the Board of Directors of the Peter Barceloux Company there is a record in the Peter Barceloux Company's books of an obligation due from Henry Barceloux to the corporation of $1717.62 and is in this open account right here—Barceloux Brothers and the account is indicated at the top as Barceloux Brothers and represents the money in actual cash that Henry and I got and which we used in operating and we were buying some hogs. [291]

(Testimony of George Barceloux.)

The obligation started May 23, 1923, when we got $1,000.00, but we paid it back on the 25th. We sold some hogs and paid it back and we got different amounts on July 3d, October 19th and December 28th, 1923, and ranging from 5, 6, 8 and four hundred dollars, and those dates as shown on page 3 speak the true amount advanced by the Company and my brother Henry and speak the true dates of the advances of the money. The item of $1,800.00 touched in the minutes of this foreclosure proceeding stand for money that had been accrued, that is a part of the money that accrued on the sale and handling of some of the Cartenberg land agreement and arose out of the contract my father and my brother Henry Barceloux and C. L. Donohoe entered into on the purchase of the Cartenberg land. I might explain that when we took over the Cartenberg contract we agreed that there should be a balance arising out of that contract of $4,500.00, when everything would be cleaned up and took that as an arbitrary figure, we entered that amount as $4,500.00 and called it Cartenberg contract and we have the contract itself and the history of the Cartenberg transaction Henry must have kept in his own books, and he probably handled that transaction through the Sacramento Valley Realty Company, which was a real estate company and selling the Cartenberg land.

When we made this entry of $1,800.00 due to the Peter Barceloux Company from Henry we took his statement of the amount and he said that was away

(Testimony of George Barceloux.)

back in 1916 and 1917, maybe 1918. They had not been anything sold at that time, and it was a subdivision tract. I computed interest on all these respective items. Not all of the items were due and owing to the Peter Barceloux Company on the 6th day of February, 1923. There was a $2,000.00 note and his half of a $3,500.00 note and the big note of $24,000.00 and the balance on that [292] Cartenberg agreement and half of the $2,000.00 note, and they were all owing to the Peter Barceloux Company by Henry J. Barceloux at the time when his stock indicated by Certificate No. 5 evidencing the ownership in him of 2,499 shares of the Peter Barceloux Company or one-quarter of the 10,000 shares. Henry had the original certificate of course, but to whom he handed it I do not know.

"Q. Did the Barceloux Company, Peter Barceloux Company ever have Certificate No. 5 evidencing the ownership by Henry J. Barceloux of 2,499 shares of common stock of the Peter Barceloux Company? A. Yes, we had it.

Q. And from when did you have it?

A. I am satisfied we had it prior to February, 1923, at least there was an understanding that we had it prior. Yes, we had it prior to February, 1923, yes."

These obligations by virtue of the pledge agreement were never paid prior to that time the debt was paid when we sold him out in August, 1926.

In respect to the additional securities that I was interrogated about by Mr. Freeman and the purpose

(Testimony of George Barceloux.)

thereof, the minority stockholders wanted us to get some more security and we did and the other securities which were included in the sale were actually sold in liquidation of this debt. After such sale H. J. Barceloux had no connection with the corporation—none at all. When this property was sold I believe his notes were turned over to him by you (Mr. Belieu) as you were acting as our attorney and in the liquidation of this debt I employed counsel to care for the proceedings to the end that the same be conducted regularly. The proceedings carried on were as indicated in the Minutes of the Peter Barceloux Company which had been introduced in this matter.

The formal notice you showed me I got from my sister— [293] that was served and I have seen that notice before. The Peter Barceloux Company is a family corporation and there is no stockholders only the children and relatives. There are three nephews and my sister and I and the corporation was organized from father's and mother's property under an agreement, and all the personal property that father and mother owned went into the corporation, and was property that my father and mother accum*m*ulated through the years of their farming operations in the Sacramento Valley and that was the only property that ever went into the corporation at the time of its organization. The paper you hand me is the trust agreement and is a paper belonging to the Peter Barceloux Company and was executed on the date it bears and at the time of

(Testimony of George Barceloux.)

the organization of the Peter Barceloux Company.

(There was offered in evidence agreement dated July 9, 1912, between Peter Barceloux and Lumina Barceloux, his wife, and Peter Barceloux Company, and marked Defendant's Exhibit No. 8.)

The entire transaction respecting the incurring of these obligations of Henry J. Barceloux with the Peter Barceloux Company, the demands for the payment of these obligations and the proceeding for the collection of this debt were and are as indicated in the minutes of the corporation of the company.

Mrs. Gelinas and I personally attended the sale, at the time of the sale indicated in the notice, for the sale of this property. [294]

Redirect Examination.

(By Mr. FREEMAN.)

"Q. Mr. Barceloux, you testified that your brother in 1926 was interested in a large scale in the planting of—in the farming of land?

A. Yes.

Q. Do you know of any land that he owned at that time? A. Interested in, yes.

Q. And that he owned?

A. Yes, he had some property near Willows.

Q. Do you know what it was?

A. Some real property.

Q. Where was it?

A. I cannot give you the description (and he had some at Orland).

(Testimony of George Barceloux.)

Q. Where was the real property near Willows?

A. In West Willows.

Q. How many acres did it consist of?

A. I don't know.

Q. You said thousands of acres.

A. I said he was interested in thousands of acres.

Q. Tell us one hundred acres he was interested in.

A. He had an interest in the Peter Barceloux Company land.

Q. He had an interest in the Peter Barceloux Company land. Outside of his interest in the Peter Barceloux Company, what interest did he have in land?

A. He had some land, I understand, an interest in some land—

Q. You understand that; I am asking you what you know. Do you know definitely of any land that he owned outside of his interest in the Peter Barceloux Company?

A. I never seen any deeds, if that is what you mean."

He was interested in three banks and was an officer of the Bank of Orland and some of the stock of the Bank of Orland was sold for $90.00 a share and at that time he had 207 shares of said stock [295] if I remember right some of it was hypothecated but I don't know how much. Some of it was hypothecated together with some of my stock to the Crocker National Bank of San Francisco for $47,000.00, I think. 130 shares of the Bank

(Testimony of George Barceloux.)

of Orland stock were involved and where the rest of the stock in the Bank of Orland was I don't know and whether 9 shares which was sold under this pledged sale was clear or hypothecated I don't know. I do not know how many shares of stock in the Glenn County Bank Henry owned or whether it was clear or hypothecated; I know nothing about it. He was interested in insurance business and had an agency in Willows and did a general insurance business, also a general real estate business and I know just in a general way of the particular properties that he owned and their value and he had some land around the Orland district in the Orland project, but how much land I don't know. He had an interest with me and several others in about 20 acres of land and had some land east of town—I don't know exactly. I have never examined the records to see just what he had.

As to the $24,000.00 note the beginning of this account starts with the previous balance and carried forward into this book as of December 31st, 1922, of the previous ledger sheet, but the balance at the time he took the note was the amount of this note and the balance carried forward on that open account on July 31st, 1922, is $1,725.00. The difference between $1,750.00 and $24,000.00 was borrowed on open account by him between the 31st day of December, 1922, and the date of the note, outside of certain credits he got during that period of the account there.

The $2,000.00 note was a renewal note which was

(Testimony of George Barceloux.)

about to outlaw and nothing had been paid on it, and the open account started as early as 1922 and 1923 and nothing had been paid on that, the $2,000.00 note. There was some credits on the open accounts and I [296] mention one credit of $1,000.00 and the balance at that time due amounted to those figures—the balance due as of date of the pledge agreement.

The note of February 27, 1922, for $2,000.00 was a one day note, I think, the records do not show. I recall the fact that it was about to outlaw because I figured that if it was one day it would certainly be about to outlaw, because the note I understand in this state is good only for four years. The note was dated in February—oh, no, it was renewed in February, 1926. There is not anything in our books showing a note on April 27, 1926, for $2,000.00 —I think he just substituted notes, took the new note for the old note and we gave him back his old note when he gave us a new note of a new date, with a new date on it, and that is all he done. We did not make any entry of the fact of a new note because we had possession of the note, but we did put that fact in our books and notes receivable account and we kept a list of all promissory notes. I told you that was a renewal of the note that he gave us on April 27, 1922, and here it is in this bills receivable account if you want to see it right here and that note is a renewal of this note and it was just an exchange of paper taking a paper that was not ready to outlaw for one that was. If I stated

(Testimony of George Barceloux.)

it was originally dated February 27, it was an error because here the book says April.

"Q. Now, you say that prior to February, 1923, you had a verbal agreement with Henry Barceloux that his stock was up as security? A. Yes.

Q. But you did not have the stock, did you?

A. Yes, we had the stock.

Q. The stock shows endorsement as of February, 1923. What did you have prior to that date?

A. We had that stock and that date was put on later. [297]

Q. It was put on it later. What was put on later? A. I don't know what.

Q. Do you recall specifically that the date was put on it later?

A. That is my understanding, yes.

Q. No, not what your understanding is.

The COURT.—Answer the question,—answer it.

The WITNESS.—Because it was understood all the time that Peter Barceloux Company understood that they had a certificate, that certificate, as collateral.

Q. (By Mr. FREEMAN.) They understood that?

A. Yes, and they figured they had it all the time.

Q. When you say 'they figured it,' who figured it?

A. Well, the company, all of the stockholders.

Q. That is, all the stockholders?

A. No, I don't say all the stockholders; the directors.

Q. Do you know from your observation of this

(Testimony of George Barceloux.)

Certificate No. 5 which shows a date of February 6th, 1923, and the signature of H. J. Barceloux, if that date was put in at a diflerent date?

A. I don't know.

Q. Was the endorsement put on there ahead of the date? A. I think it was.

Q. How long before?

A. Some time before that; I would judge perhaps a year before that.

Q. Did you see the date put on there when it was put on?

A. Yes, yes, that was in his office. One day I was down there and we were discussing these matters and he took this book out and put the date on —he brought the Peter Barceloux Company envelope where he had all the notes and securities out and he put the date on.

Q. Did he have that stock in the same envelope? [298]

A. The same envelope with the notes of Peter Barceloux Company.

Q. Yes. And at this time, the endorsement or his name was on there before that date?

A. Yes.

Q. And you put on that date? A. Yes.

Q. You remember it distinctly?

A. As near as I remember, yes.

Q. Do you remember?

A. That is the way I remember it, yes."

We employed Mr. Belieu, an attorney to make a sale of this pledge and he asked us $500.00 as a fee

(Testimony of George Barceloux.)

and he said he would close it out for us and this was some time after the last of July before the time we gave the notice, as Mr. Belieu had been the attorney for the Company regularly.

The minutes of the July 28th meeting when Mr. Henry Barceloux resigned were made by Mr. Napton, I think, and the first minutes that Mr. Belieu made were August 5th. He asked me for $500.00 for closing out the stock and we agreed to and did pay him it. On April 27th when we figured up the account of indebtedness that he gave as security, they did not get security for my part, but on August 5th when we advertised it for sale I paid my part with a new note—I did not pay it in cash. At that time Mrs. Gelinas did not owe the corporation money and there was nothing said about him giving a new pledge agreement and we never asked for a new pledged agreement at that time and the only pledge agreement that the Peter Barceloux Company ever had was the one that is introduced here dated April 27, 1926, and that particular pledge agreement was made and filled in by Henry in my presence and he took the books to his own office as custodian of the company's property and he had the agreement with the Peter Barceloux Company's papers and when he delivered the papers to me [299] when he resigned as director and president of the corporation he delivered that pledge agreement among other papers and all of the active books of the corporation. He also delivered promissory notes and each stock certificate and the stock certificate book is here in

(Testimony of George Barceloux.)

evidence and my sister had the stock certificate book and I feel positive that I got it from her in her office.

Recross-examination.

(By Mr. BELIEU.)

I do not now owe the Peter Barceloux Company any money whatever and Cora Gelinas does not owe the Company any money whatever. The bunch of checks you show me are corporation checks to Henry Barceloux and the Peter Barceloux Company deposited with the Glenn County Bank in Willows and the Bank of Orland at Orland and they deposited with each bank. I think we have about all the checks on the Glenn County Bank evidencing advances made to Henry Barceloux but the ones on the Bank of Orland, there was only a few of them, but we haven't them, because when Henry took the books my sister says they were turned over to him at the time when my brother-in-law died, or before he died when he was not able to go ahead and keep the books and I never got them, but those particular checks were turned over to me. Part of the checks indicate money that were advanced to Henry by the Peter Barceloux Company during a certain period and these were checks part of which went into the obligation evidenced by the pledge and went into that book account and later the book account was taken up by the note.

Redirect Examination.

(By Mr. FREEMAN.)

Immediately after the transfer or issuance of

(Testimony of George Barceloux.)

Certificate No. 12 my brother gave me a mortgage on his interest on some personal [300] property in Lake County for some moneys that he owed me on open account that had dated back eleven or twelve years and he told me he ran the account through his books—I did not have any. I did not have any books of my own and some covered Glenn County Telephone bonds that he was holding for us and never delivered to us, rather delivered to me—that was personal and he had those bonds since they sold the Glenn County Telephone bonds in 1915. The consideration was some money and I signed a note to the Glenn County Bank for some money that went into the hog deal and we were handling some hogs and there was a balance of $2,600.00 that I had to pay personally.

The original obligation to the Glenn County Bank on the hog deal started with $4,000.00 in 1923 or 1924 something like that and the note that I accepted from him at that time was for $3,500.00 and was made payable one day after date and I took as security therefor a half interest in a lot of personal property and the Lake County Ranch which we had owned together.

We had owned it together and at the time of giving the chattel mortgages we still owned the personal property together, not all the personal property on the ranch but part of it. I took a chattel mortgage to cover all the personal property he had on the Lake County Ranch.

Part of this $3,500.00 represented by that note was for an old land deal that took place in 1917

(Testimony of George Barceloux.)

and I might explain it this way. They got a piece of land and I had an interest with them and they used some of my money and that was traded kept trading until finally they traded it three or four times in several years.

I asked Henry several times for the money and he said "well some of these days we will sell what we have and divide the money. We will sell the land." I don't think he gave me any note prior to that time. That is not the first promissory note I asked [301] him for. I asked him for another in 1907 or 1906.

I had books on the Lake County Ranch and I carried that note on my books and these hogs were not bought in connection with the Lake County Ranch because they were handled on the home ranch on rice stubble and they got cholera and the debt was not paid and that is why I had to pay the debt.

I was a witness in the case recently tried at Willows in which Elmer Barceloux and others were plaintiffs and Peter Barceloux Company was defendant. The statement you show me purporting to be a statement of Peter Barceloux Company as of December 31st, 1927, and introduced as plaintiff's exhibit in that case looks like a statement taken from the books of the Peter Barceloux Company but the values that appear on the statement were not placed thereon by me.

The valuation of the sheep account for instance $4,619.50 was taken from the books of the Peter Barceloux Company and the Orland Bank land at

(Testimony of George Barceloux.)

a valuation of $2,304.60 and the Cartenburg agreement carried on the books at $2,700.00.

The notes receivable carried on the books at $105,-415.80 and the item from George St. Louis $105.47 is apparently owed by him to the Company and the same thing applies to the account of E. J. and Vernon Barceloux and $288.55 and those things were all taken from the books.

The notes receivable varied during April and August, 1926.

The surplus account of $218,388.12 is problematical. When we organized the company we took each piece of land and we placed a value on it, guessed at that value and carried those different properties at those valuations that we estimated at that time in the account and our capital was taken as that. It was $100,000.00 and the difference between $100,000.00 and the total that these assets that father and mother turned in amounted—what that amounted to went into the surplus and we carried on our books this date undivided [302] profits $38,663.00, earnings of the company since the organization.

These books do not show what the cash balance was on August 1, 1926.

The Peter Barceloux Company has not since its organization sold any stock to outsiders and no one of the stockholders have sold any stock to an outsider because this was a family corporation and father and mother turned over the property with an understanding they would get all the returns and naturally that made the stock unsalable to an out-

(Testimony of George Barceloux.)

sider, and it was incorporated in the trust agreement. I have examined the records to find out the valuation of the notes receivable and it amounts to about $51,000.00 which includes all of the notes of course—some are not collectible. This includes the note to Nancy Small for $10,000.00 and the Fortena notes, two of them, one for $1,500.00 and one for $1,000.00, A. J. Lewis note for $6,000.00 and my notes and in April, 1926, I was indebted to the corporation somewhere around $9,000.00 or $10,000.00 maybe $11,000.00. There appears in this statement on September 7, 1927, a note of myself to the corporation for $5,000.00 and the note was not in existence in 1926, in June, July or August and the note did not go into effect until April 1, 1927, and this other note for mine for $11,075.00 I owed at that time, but not all of that in April, 1926. I did not borrow any money from the corporation between April 1, 1926, and July 16, 1926. Elmer Barceloux's note of $15,985.00 was included at that time, that is in April, 1926, and I think the W. A. Knowles in the sum of $720.23, and another one of Knowles for $85.00.

The note of September 7, 1927, for the sum of $6,000.00 of H. J. Barceloux is the note of the Crocker First National that we bought, they are at the Crocker First National. There was one note of $10,000.00 and one for $6,000.00 and the $10,000.00 note is there somewhere and the other note of H. J. Barceloux $16,000.52 is the balance, the $10,000.00, and the collateral for that note was eventually [303] sold under a foreclosure, the regular

(Testimony of George Barceloux.)

legal proceeding. A pledge sale notice was given to Henry Barceloux.

A note of Vernon Barceloux for $554.19 was in existence April, 1926, and W. H. Hopper $241.80, A. J. Carney $96.50, C. A. Boegue $658.00, another C. A. Boegue for $103.00 and Sacramento Valley Realty Company $2,305.00.

At that time we had as assets of the corporation some United Bank & Trust Company stock, 27 shares I think—about 46⅔ but some of those are kind of rights, about 11⅔ shares and they had value, but not the same value as the shares, but I do not remember what the difference between the value of a right and share was. We carried the 11⅔ rights on our books for $1,458.34, I think the corporation had 75 shares of the Bank or Orland and still owned it in the months of April, June, July and August and had a savings account in the Bank of Orland, but I could not tell you whether it was in April.

On September 7, 1927, I do not know if we had $8,242.00 in the savings and I do not know how much cash we had on hand at that time and in order to find out I would have to strike a trial balance of that date.

As to the obligations of the company as of April, 1926, I don't know. We might have had something and 14 and 15 hundred dollars United Bank & Trust, I am not sure of that. I know we had at some time borrowed from the United Bank & Trust Company. In 1926 all of the properties of the corporation were encumbered at that time. There

(Testimony of George Barceloux.)

were no mortgages on any of the real property and none of the personal property was up as collateral, except for the $1,400.00 which was an open note.

I and my brother Henry and Mr. Harlan bought the Aden Ranch in 1917 and I believe we paid $58,000.00 for it and we made improvements on it—we planted a lot of alfalfa, fixed up fences, built a [304] large barn and other buildings. I think we built the barn in 1922 at a cost of $3,000.00 and I do not know what we spent on improvements altogether. I think we put in about 258 acres of alfalfa, but I do not know how much it cost per acre.

The Lake County Ranch consists of about 5,000 acres and about 400 acres of it is real bottom land and there is little valleys for farming land through it and I think a couple of hundred acres was put in grain and at the outside there is about 600 acres in farming land, there might be more, I could not tell you exactly.

(The inventory and appraisement was introduced in evidence and marked Plaintiff's Exhibit No. 22.) [305]

TESTIMONY OF HENRY BARCELOUX, A WITNESS CALLED BY THE PLAINTIFF UNDER SECTION 2055 OF THE CODE OF CIVIL PROCEDURE.

HENRY BARCELOUX, after being duly sworn, testified as follows:

(Testimony of Henry Barceloux.)

Direct Examination.

(By Mr. FREEMAN.)

My name is Henry J. Barceloux and I am the bankrupt in this case and one of the defendants in the case of Frank Freeman against Donohoe and Barceloux.

Prior to August 16, 1926, I was the owner of 2,500 shares of the capital stock of the Peter Barceloux Company evidenced by two different certificates.

On the 28th day of July, 1926, about the time I resigned I was president and managing director of the Peter Barceloux Company, a corporation.

During all the times prior to July 28, not all books, papers and documents belonging to the corporation were in my possession and for a number of years up to the time that my brother-in-law died it was all handled by my father and he. For a time between July, 1923, and July, 1926, all papers and books of the corporation were in my possession and some were in a vault in the bank and some were in my office and I had access to the safe deposit box of the bank and at different times I borrowed money from the corporation.

"Q. At different times. At any time prior to the 17th or the 27th day of April, 1926, did you give any security to the Peter Barceloux Company for any of your indebtedness? A. I did.

Q. What security did you give them?

A. I gave them my stock for collateral.

Q. How did you give them your stock?

(Testimony of Henry Barceloux.)

A. I just [306] presented them with the stock certificate.

Q. You say 'them'; who do you mean by 'them'?

A. I presented it to my father. My father was then—he was manager of the corporation and the stock was either delivered to him or to my brother-in-law who was then acting as assistant secretary.

Q. When was that done?

A. Some time in 1917 or '18. I think that is about the first time I borrowed any money from the company.

Q. And at that time you gave your stock-book to your father, did you?

A. I did not give it to him—I gave it to either him or my brother-in-law who then had charge of the company.

Q. All right, at the time when your brother-in-law gave you the handling of the books, papers and documents of the company he gave you back your stock certificate?

A. No; he did not give them back to me. I got them with the rest of the books and papers belonging to the corporation.

Q. And at that time did the stock certificate for your 2,499 shares have any endorsement on it?

A. It did; it must have.

Q. Well, did it?

A. When I gave it to them I must have endorsed it.

Q. I am asking you for the fact?

A. I could not state at this time whether it was or not, but I presume it did.

(Testimony of Henry Barceloux.)

Q. Do you have any definite recollection of at any time endorsing a stock certificate?

A. I have no definite recollection, no. [307]

Q. I show you certificate Number 5 in this book for 2499 shares of stock. Will you examine that endorsement on it? Just refresh your memory as to when it was endorsed.

Mr. BELIEU.—The date says here February, 1923.

Mr. FREEMAN.—Q. February 6, 1923. Was it endorsed at that time?

A. I won't say that it was endorsed at that time. I think—I firmly believe that it was endorsed before that.

Q. Well, you cannot say definitely that it was.

A. No; but then I imagine because there would be no reason for me giving them the stock as collateral without endorsement."

There was not any other stock belonging to the Peter Barceloux Company other than this one and the handwriting on the stub of the stock certificate looks like my handwriting, but I do not know when it was written there. I did not say that after February 29, 1923, or during the month of February, 1923, the stock-book was in possession of my brother-in-law and I said when it was probably turned over to me and just when it was I do not remember. I could not state that my brother-in-law had this stock certificated February 6, 1923, but if he had the property in July, probably he must have had that stock and I have no recollection about putting that date on there of the endorsement. I do not recall

(Testimony of Henry Barceloux.)

I gave the corporation the note for $24,000.00—I don't recall the date, but I know I gave the corporation a note for $24,000.00 and the note was given for the accumulation of moneys which I had previously borrowed and the indebtedness accumulated between the years 1917 and 1918. There was an oral understanding between the corporation and myself when I first gave them that stock and I had that oral understanding only with my father who was handling all the properties of the corporation at that [308] time and the rest of them must have known about it.

"Q. Now, then, in the month of April, 1926, you executed a pledge agreement that is in evidence here. Why was that pledge agreement executed at that time?

A. Only the demand my brother-in-law made upon me which was he wanted a pledge agreement, and, as far as the other matter was concerned it was an oral arrangement and he wanted to have it in writing.

Q. When did he first ask you for a pledge agreement?

A. I could not tell you that. It was some time prior.

Q. Who drew the pledge agreement that you submitted?

A. I am not sure,—I have been trying to figure out and think who drew that agreement, and I cannot think for the sake of me.

Q. It was all made out for the satisfaction of

(Testimony of Henry Barceloux.)

the property and the amount of the indebtedness, wasn't it? A. I think that is so.

Q. And where was it executed?

A. That, I do not remember; I think in my sister's store.

Q. Was it at a meeting of the corporation?

A. I don't know. It was a regular meeting. I think my sister and brother were there.

Q. Your brother George was there?

A. I think so.

Q. Certain of that?

A. I am positive; that is, I am not positive, but I think he was."

At the time I included in that pledge agreement my note for $24,000.00 and the note for $3,500.00 and another obligation I don't know as we checked them over, because I knew about what I owed them, and at that time I don't think I put in all that I owed the corporation, and put in just simply the notes for those happened to come to my mind at that time and I think there must have been some [309] discussion about it, though there might not have been, and I don't remember that anything was said about reducing those to conform with that note, i. e., the other obligation and I did the writing that went into that pledge agreement and the main part of the pledge agreement was typewritten and I wrote in the portions in ink. I presume that what I owed to the company was known to George Barceloux.

"Q. Was there any understanding between you and George prior to the time you went to that

(Testimony of Henry Barceloux.)

meeting, what you were to pledge as security?

A. I don't think there was. Anything that I had—it was the oral understanding that the company was, for all the advances and future advances, —whatever they be,—that I was to give this certificate as collateral.

Q. That is, your 2,499 shares? A. Yes.

Q. Was that to be collateral for all your obligations to the company?

A. The obligations that were at the time I gave the collateral and preceding obligations that I might have.

Q. Knowing that at that time why wasn't the description of the property to be pledged typewritten in there? A. Why wasn't it?

Q. Yes. When you had it prepared?

A. That, I could not tell you.

Q. They had not asked you for any other property, had they?

A. You mean any other property other than the stock certificate.

Q. Other than the 2,499 shares?

A. No, I don't believe they had.

Q. There had never been any discussion about that up to April 27, 1926?

A. Well, I don't think so. [310]

Q. Now, did you have with you at that time and at that meeting, Certificate Number 5 for your 2,499 shares? A. I don't recall.

Q. Was anything said, Mr. Barceloux, when they demanded such written security from you about the fact that I had this judgment and was trying to make collection from you?

(Testimony of Henry Barceloux.)

A. No, there was not.

Q. Now, after you signed the pledge agreement what became of it?

A. It was, no doubt, put back to the company's safe deposit box.

Q. Who put it back? A. Probably I did.

Q. Do you know whether you did or not?

A. I think most likely I did."

In the month of June, 1926, according to the corporation record, on the 29th day of June, certificate No. 12 was issued to the corporation as pledgee and this was done through the instruction of Messrs. Ware & Ware and they said it would be better to have the pledgee on the stock and they were acting as attorneys for the corporation to a certain extent—they were my attorneys and I probably asked them about it.

Q. What brought up the discussion between you and Ware & Ware as to that certificate?

A. I don't know as there was any discussion about that. That was at the time when you were getting up those agreements.

Q. Now, it was caused by that fact, wasn't it, Mr. Barceloux, and as a result of that fact?

A. No, I don't think so.

Q. You don't think so? A. No.

Q. Isn't it a fact, Mr. Barceloux, that I was demanding security from you and among other securities the [311] 2,499 shares of stock?

A. No; you were not demanding the 2,499 shares of stock. You were demanding my equity in the 2,499 shares of stock, over and above the indebtedness that was due the Peter Barceloux Company.

(Testimony of Henry Barceloux.)

Q. All right; but whatever I was demanding had to do with the stock of the Peter Barceloux Company, didn't it?

A. With the stock in the Peter Barceloux Company, yes."

I don't know at the same time you were asking me for a trust deed on the Lake County property as you simply mentioned it as an agreement and the agreement was a voluminous thing, and when you asked me for the security of the Peter Barceloux Company stock, I, my sister and brother went to Chico and I don't think that it was after that stock Certificate No. 12 was issued and Certificate No. 12 was issued on June 29, according to the stock certificate book and I think our discussion with Ware & Ware was about that same date, and I think that I consulted Ware & Ware at the time you (Freeman) got up your agreement and the agreement I refer to had to do with the equity in the stock.

"Mr. FREEMAN.—Q. Mr. Barceloux, while you and your sister and brother, all officers of the corporation were in Ware & Ware's office, the making of this assignment was discussed, was it not?

The COURT.—Which assignment to Freeman of the interest in the 2,499 shares.

The WITNESS.—I don't know, Mr. Freeman, whether it was or not. My mind is absolutely blank as to what happened then.

Mr. FREEMAN.—Q. Now, wasn't it a fact, Mr. Barceloux, that you took over with you to Ware & Ware a notice that I had prepared to the Peter Barceloux Company of the assignment [312] by

(Testimony of Henry Barceloux.)

you and a consent by them to the issuance of the stock certificate to me and that they refused to sign it? A. Was that at that meeting?

Q. At the meeting at Ware & Ware's office.

A. I don't think so. I think that was done over there or it was taken up by Mr. Ware after that.

Q. Anyhow, such a matter of that was taken up, wasn't it?

A. It was taken up at some time within a few days of that time, but just when, I don't remember.

Q. Well, I am just getting to the fact that such a matter was taken up, wasn't it, with your brother and your sister, and they refused to sign it?

A. Yes; I think that is a fact."

I resigned from the corporation in July because I figured that I did not have any more interest in it, because everything I had in the corporation had been assigned as security. I think that was about the only reason I had for resigning. There may have been other reasons, but I think that was the main reason.

Up to July 28th other members of the corporation said something to me about my payment of obligations to the corporation and there was a great deal of dissatisfaction existing over months and I cannot possibly say whether there had been any payment made by me at the time on my indebtedness to the corporation and about the 28th of July I sold my remaining one share of stock to my sister for $25.00 and I did not offer that share of stock as security to anybody or for sale to anyone else but my sister and I received the $25.00. I did not

(Testimony of Henry Barceloux.)

pay that on account of any of my indebtedness. That the time Certificate No. 12 was issued I do not think I turned over to the corporation 75 shares of Pacific National, 100 shares of Glenn County Garage and 9 shares of Bank of Orland. I think that was [313] done around the 3d or 4th of July and I did that because George Barceloux asked me to and they wanted additional security and the consideration for my giving the additional security was the debt that I owed them and not having paid any interest to the corporation for that long time and it is impossible for me to remember how long it has been since I paid any interest to the corporation, but I think that there was some amount paid at some time or another as interest.

There was not a threat to sue me on my pledge agreement on the 3d of July and the additional stock I gave them I think was done at the Bank of Orland and I think my sister was there and this was done about the time I gave George the chattel mortgage on the Lake County property.

There was not any other written agreement between me and the corporation at that time respecting the additional stock that I assigned as I did not deem it necessary because the one that was in existence took care of it and there was no further agreement than that which was in existence already.

The 75 shares of Pacific National, 50 shares of Glenn County Bank and 9 shares of Bank of Orland were not physically present at Orland that day and were probably in my safe in the Glenn

(Testimony of Henry Barceloux.)

County Bank Building and I think the stock certificates representing those stocks were actually delivered to George or Mrs. Gelinas about the 5th or 6th of July.

I think it was delivered to them at Orland or to the Bank of Orland. I think it was on the 7th day of July I made an assignment of my interest in the Neilson property to Mrs. Barceloux, my wife. I did not transfer any property to my wife; I sold her a contract and it was a contract on some future prospects on some deal of Mr. Neilson. I can't explain to the court what it was. It is in evidence in the testimony here. The consideration of the transfer to my [314] wife was $1,000.00, but I don't remember whether cash or check, and it was her separate fund and she got the money from the bank on her note—she borrowed $1,000.00 from the Glenn County Bank on her note. I was president of the Glenn County Bank at that time but not the active manager and I did not endorse the note and I don't know how I figured the value of that to be $1,000.00 at that time, except if I remember right I needed about that much money to pay some interest and a power bill. I do not know what equity I had in the Neilson contract and nobody else knew either. The correct statement about the Neilson deal is, Neilson bought the land himself from Mr. Samuels and they advanced the money and after working the land, Mr. Neilson was to work the land, and out of the returns of the land he was to pay the purchase price back to Samuels and if after this had been done the land had been

(Testimony of Henry Barceloux.)

paid back, then I was to get an interest in it and I did not have an interest in it until Mr. Neilson had made enough money to pay back to Mr. Samuels the purchase price of that land. My interest in it was a very remote one and as it turned out I did not get any money out of it.

The purchase price of the 320 acres of land was around $11,000.00 and I did not have anything to do with the operation of it. I didn't raise a rice crop on it and I had no interest in the rice crop growing on the land in the year 1926, but an interest in the land when paid for and Mr. Neilson was to pay for it any way he could. I do not know how much was paid down on the land at the time I transferred whatever interest I had to my wife. It is not a fact so far as I know that at the time I made the sale to my wife of the Neilson land there had been paid out as profits on the land from the contract was made on the 25th day of July, 1926, and up to the time I made the sale to my wife, the sum of $5,600 which had been paid on the land and I did not keep the books respecting the Neilson [315] contract. I think there was a rice crop growing on that land in the month of July, 1926, but I had no interest in the rice crop and the only explanation that I made to my wife at the time of this contract was, that if Mr. Neilson made the money to make the payment, that there was an equity there for her, but I did not tell her what the equity was, because I did not know.

I was not at the meeting of the month of August at which they decided to sell my Peter Barceloux stock and I was not even a member or stockholder

(Testimony of Henry Barceloux.)

and I was not present at the meeting. I have not examined the claims that were filed in my bankruptcy proceeding and do not know what they are and I think at the time of the first hearing there was an objection on my part to some of the claims filed, but the objection was to the small claims.

I was indebted to W. E. Johnson in the sum of $500.00 for services commencing January 20th, 1925, and ending December 31st, 1926. I do not think I was indebted to the Willows Machine Works in the sum of $57.00 for items that accrued in March and April, 1926. As to the claim of Arthur C. Huston for the sum of $10,000.00 legal services, he says that is what I owed him, up to the 2d day of October, 1926. As to your claim (Mr. Freeman) as administrator of the estate of Frank Freeman on account of a judgment of $59,725.00 there has been some paid on that and there was a judgment against me in a substantial amount and that judgment arose out of a partnership accounting case against the H. J. Barceloux Campany and your father (Freeman) claimed that the partnership was dissolved on the 1st day of June, 1910, and I claim there never was a partnership and the suit was filed some time in 1917 or 1918.

On June 5, 1926, I owed A. R. Hancock the sum of $18.50 and I owed Cooley & Gallagher the sum of $106.90 for professional services rendered in 1925. I did not owe the Glenn Colusa Irrigation [316] District the sum of $36.40 for water furnished in the year 1926. I don't think I got the bill for that. I owed as guarantor on a note of the Re-

(Testimony of Henry Barceloux.)

ceiver for the Sacramento Valley Realty Company the sum of $126.76. I did not owe the L–K Garage the sum of $45.95. I owed R. M. Rankin the sum of $570.70 for professional services and court costs from November 1st, 1925, to February 18, 1927, as he was representing me in certain actions and I was indebted to the Bank of Willows at that time on a note dated July 28, 1926, for $2,470.00. I did not owe Ed. M. Sehorn the sum of $158.20 on book account as of February 4, 1926, but I was indebted to the Ellis J. Levy Company in the sum of $522.00 on a promissory note dated December 12, 1925. I owed Kyle Corson the sum of $49.85 for storage. I guess I owed you (Mr. Freeman) the sum of $94.-00 for costs advanced and fees paid to Sheriffs of various counties on execution. I also owed Arthur C. Huston the sum of $575.45 on account of a note dated February 28, 1923, but I did not owe at that time the Crocker First National Bank of San Francisco the sum of $48,700.00 on a promissory note, but in 1926, I owed money to the Crocker First National Bank which I paid in 1927 or 1928, and I owed the Crocker First National Bank some money in 1926, but I could not tell you how much without getting some records, but approximately it was $39,000.00. I was indebted to Mary Cecil on a promissory note dated December 29, 1920, which was a joint note—$1,620.00. Ware & Ware of Chico claim I owed them $1,500.00 for services rendered within two years prior to the 5th day of March, 1927, and the services were rendered within two years prior to the filing of the claim. I know Ware & Ware were employed by Mr. Harrison and

(Testimony of Henry Barceloux.)

they done a lot of work for Mr. Harrison in the Realty Company, but whether it was charged to me at that time I do not remember but they rendered services for me after April 27, 1926, and up to the time of my bankruptcy. I consulted them with reference to those agreements [317] in June and I think there were occasions they representd me in a case or two after that, and I think they rendered services to me after August 16, 1926. I think I owed my brother George Barceloux one-half of a promissory note made by H. J. Barceloux and George A. Barceloux to the Crocker First National Bank in San Francisco in the sum of $48,700.00 dated December 27, 1925, and I owed W. A. Knowles of Willows $480.00 on a note dated July 2, 1926, and the consideration of the note was salary that I owed him for three or four months and I gave him security for the note five shares of Glenn County Bank stock on July 2, 1926, and Knowles was my employee and also in the employ of the Peter Barceloux Company as he was keeping the books. At that time I owed the Peter Barceloux Company $2,700.00 balance due under contract between H. J. Barceloux and Peter Barceloux Company, land held in trust by the bankrupt and refers to the Cartenburg tract.

I owed, on April 27, 1926, an old account to Peter Barceloux Company for something. I owed the Peter Barceloux Company at the same time an unpaid balance on two promissory notes, one dated October 27, 1926, in the principal sum of $6,000.00 and the other dated December 2, 1926, in the

(Testimony of Henry Barceloux.)

principal sum of $10,000.00 in favor of the Crocker First National Bank of San Francisco, the promissory notes were signed by the Crocker First National Bank and Peter Barceloux Company.

Those amounts on those notes were due and owing to the Crocker Bank prior to April, 1926, and I borrowed money from the Crocker First for years. Prior to April 7, 1926, I owed the Crocker First National Bank on my separate note and they held collateral, which collateral went to the Peter Barceloux Company when that company assumed that obligation and the Peter Barceloux Company took up the notes at the Crocker Bank and took the securities that were [318] there and the note for $48,700.00 was a joint note of myself and George Barceloux and was secured by Orland Bank stock and I think the security was afterwards taken up by my brother George. I think George paid the note—I know he paid that note. I don't think that George and I went to the Crocker Bank for the purpose of making arrangements to take over the $48,000.00, but I think the arrangements were made about the $16,000.00 note and they wanted their money on it, in 1926 or 1927 and they called George Barceloux and myself down there.

"Q. What has become of those securities now? Have they ever been sold?

A. I think so; I don't know.

Q. Do you know whether they have been sold to George Barceloux?

A. The bank—you mean the collateral that was held?

Q. Yes.

(Testimony of Henry Barceloux.)

A. Well, I know the Orland Bank stock has been sold.

Q. I am speaking about the stock you had up with the Crocker Bank as security.

A. Security.

Q. And that security was assigned to your brother by the Peter Barceloux Company. Has that stock ever been sold in satisfaction of that indebtedness? A. I think so.

Q. When was it sold?

A. That, I could not tell you.

Q. Did you have notice it was going to be sold?

A. I think so.

Q. Did you notify anybody it was going to be sold? A. I don't think so.

Q. Do you know whether that sale was a private sale or public sale?

A. That, I could not recall.

Q. Did you ever take any interest in finding out?

A. No." [319]

As to the 5,260.7 acres of land situate in Lake County, California, I don't know whether I owned a half interest in that land during the month of April. Possibly by paying the amount back I would have a half-interest and when I say paying the amount back I mean there was a mortgage on the property for $30,000.00 and I owed my brother some money, $10,000.00 or $12,000.00 and whether his claim was filed in the bankruptcy proceeding I don't know.

My brother had a deed from me for that land and then he deeded it back with the understanding that

(Testimony of Henry Barceloux.)

I was not to put it of record and then he filed suit against me and against Freeman as administrator in the Superior Court of Lake County to quiet title to the land, claiming that he owned it all.

In my schedules is 87/1000th interest in 20 acres of land which I had in 1926 and I was interested in some land held by the California Midland and Sacramento Valley Realty Company as a stockholder of those companies. I have stock in both companies and in April, 1926, I really don't know how much I had. I had more than one-third and I think I had Donohoe's one-third also and I think I had 1,700 shares at that time and I think in April, 1926, my shares in that corporation were hypothecated and I don't know where they are now.

I had the one-third of Donohoe's share and I think you have those now, my wife hasn't them; she has the Quatman shares. I have nothing to do with her getting those shares, only through that loan on the Crocker First National Bank of San Francisco. I paid off a debt there.

In my assets I scheduled an Apperson four passenger automobile, 1921 model at $150.00 and a lien was claimed for storage charges by Corson. I claimed an *exempt* on some wearing apparel and I also claimed a one-fourth part in 300 sacks of barley, a half-interest in a lot of farming machinery, hogs and other things, 300 [320] sacks of wheat on the Lake County ranch and I think this property was described in the mortgage that I gave my brother George Barceloux on the 3d day of July, 1926, and I think it was my intention to cover it,

(Testimony of Henry Barceloux.)

to cover all that property. I had a 75 Holt tractor which I scheduled as being on the Barceloux ranch and worth $200.00. I also scheduled some promissory notes made by the Sacramento Valley Realty Company in 1918 or 1919 and I think they had some value, and a receiver was appointed for the Sacramento Valley Realty Company to protect the interest of the corporation.

The lands of the Sacramento Valley Realty Company and the California Midland, a subsidiary corporation, lost their lands by reason of foreclosure suits or sales under irrigation district assets and the lands were never redeemed and whether the same condition existed in April, 1926, I don't know.

There was 40 acres north of Willows of the Sacramento Valley Realty Company free of encumbrance. This land is two miles north of Willows. I knew the piece of land that went to the accountant working on the Sacramento Valley Realty Company books and it went to him for services rendered, but there was no mortgage on it and he finally got possession of the property. I also scheduled an action I had against G. A. Ostrum on an open book account for moneys advanced in 1922, amounting to $3,500.00, and I think it had value and I think the thing could have all been worked out. He was working for me and I think it could have been eventually worked out. As to whether he was working for me in April, 1926, I cannot say but at all times he was willing to help me out getting that money and it could have been worked out if it had not been that I was in the position I was. It

(Testimony of Henry Barceloux.)

was not secured in any way and the trustee in bankruptcy could have worked it out in the manner I suggested, and I think the debtor here wants to do so. [321]

The open book account against Chanon Singh reduced to judgment in 1925 for $1,577.00 could have been worked out the same way and there was some security and he was perfectly willing to work it out and Chanon Singh was a Hindu laborer and could not own any property.

The three policies of insurance made payable to my son and wife I claimed as exempt and I also scheduled a judgment against the Hindu named Nama Singh for the sum of $2,589.00, which was unsecured and he owed the money prior to April, 1926, and I never tried to collect it.

With reference to the claim to contribution against Charles L. Donohoe on account of the judgment entered in the case of Donohoe and Barceloux, the claim of $7,000.00 is probably for moneys I advanced already and I think the claim had value as of April, 1926.

Donohoe had gone into bankruptcy in 1924 but, Mr. Freeman, you know that during all of that time that you and I had an oral agreement whereby we were going to try to collect from Mr. Donohoe his part of that judgment. He had plenty of assets, and we were working together. Well, we did not because of the fact that you did not go ahead and work on that proposition and try to get it thru; neither did the trustee in bankruptcy. He just laid

(Testimony of Henry Barceloux.)

down and did not go ahead and I have no way of making any move.

George R. Freeman, as administrator, was not the trustee in bankruptcy of Donohoe, but, Mr. Freeman, you know very well that yourself, Mr. Arthur Huston and I had an oral agreement whereby I was to do certain things and I was to protect you on that judgment all I could and that we were to work together.

I also scheduled two judgments against the Sacramento Valley Realty Company in the sums of $143.00 and $1,680.00 and the money on these judgments was due prior to April, 1926, and I have [322] collected some money on them and there was a balance left prior to April, 1926, and as you know there is a note outstanding, or was outstanding and a mortgage that is in your possession in reference to that judgment. I don't think I had any other property real or personal in April, 1926, other than set forth in my schedule as being transferred to my family; of course this was all done by memory and I might have omitted something in my schedule.

It is not true the only property I had left as of April, 1926, was property either transferred to my family or pledged — then or subsequently in the month of July or was encumbered by being hypothecated to the Crocker First National Bank or the United Bank and Trust Company or the People's Bank at Sacramento. I had a part of the collateral under your judgment, Mr. Freeman, consisting of 70 acres of land east of Willows, 70 acres north 66 town lots—18 acres with a house on it and the seven

(Testimony of Henry Barceloux.)

acres south of the canal, and in these particular lands I had a two-thirds interest and some the holding interest on it.

(There was then introduced in evidence the certified copy of the finding in the case of Freeman vs. Donohoe and Barceloux, and marked Exhibit No. 11.)

Between April 27, 1926, and February 25, 1927, the date of my adjudication in bankruptcy, I did not acquire any property by right, inheritance, purchase or otherwise.

At the time of the litigation between myself and Frank Freeman, my sister and brother were living in the county, but I don't know as I discussed with them the Freeman litigation. I was on friendly terms with them. I did not testify that in the year 1912 I borrowed money from the corporation, but I testified that in either 1917 or 1918 I borrowed money from the Peter Barceloux Company and gave my stock as security and as I stated yesterday I gave it to my [323] brother-in-law or my father, but I think it was to my brother-in-law, and when I discussed at Orland on July 3d the additional security I was going to give to the Peter Barceloux Company, I don't think I had any other security left and I think about the 30th I gave you everything you wanted and that is some of the stuff you did not want.

You did not want the Pacific National, Glenn County Garage stock and the Finance Corporation stock. I asked you to take these and other equities that were in the same condition. I asked you to

(Testimony of Henry Barceloux.)

take my equities in all my bank stock and the equity in this stock that was not hypothecated and I begged you to take that stuff rather than to take the Peter Barceloux Company stock for the reason that I told you $6,000.00 of the money I had paid you Mr. Freeman on that judgment was money that I had borrowed from the Peter Barceloux Company and they were opposed to letting me have it but I finally got the money and turned it over to you, which is a part of the indebtedness that I owe the Peter Barceloux Company at this time and I told you it would create a fuss if it was done and you simply said you wanted it. I said, "All right," I said, "Take it."

"Q. And you said it would create a fuss?

A. It evidently did.

Q. When? A. Right afterwards.

Q. That is about the time you were going to Ware & Ware, wasn't it?

A. I went—I would not say as to the time I was going to Ware & Ware.

Q. Well, it did create the fuss, and in so far as you know, your brother and sister went to Ware & Ware and discussed the matter of this assignment?

A. No, we did not go there to discuss the matter of this assignment. We went there—at the time I got them to go there,—I wanted them to go over there and consent to the assignment that you had satisfied, that you gave me. [324]

Q. But what fuss did it create, Mr. Barceloux?

A. Well, the fuss it created was, after that was done in July, they wanted additional collateral and

(Testimony of Henry Barceloux.)

I gave it to them and after that what did they do? They sold the stock and everything.

Q. Did you give them an agreement at that time to sign evidencing an assignment or notice of assignment to me? A. I think so.

Q. And did they sign it? A. I don't think so.

Q. And why didn't they sign it; what did they say about it?

A. Well, I don't remember exactly, except that they would not sign it and then there was another agreement, paper, as I remember it, from Ware & Ware, thru some conversation in your office and them; something about a paper, I don't remember now."

I did not as a matter of fact place the valuation of my interest in the Peter Barceloux Company at $80,000.00 on the date that it was sold by the Peter Barceloux Company.

The entry you show me on the journal at page 46 was not made by me, but evidently the meaning of this entry was this: At the time this entry was made, that the sale of the stock—I expect that Mr. Knowles, to balance that account on account of the sale he put that to profit and loss of $52,117.39, which made the $80,000 for that stock. Evidently it was put on the books at one time or other at a value of $80,000, that is the stock was.

I don't know whether I carried the valuation of $80,000.00 in my books in the month of June, 1926. The books will speak for themselves.

The item on page 45 of the ledger of August 24, 1926, has to do with the stock taken over by Mrs.

(Testimony of Henry Barceloux.)

Gelinas and as to the valuation [325] of those stocks on my books, the only way to explain that would be this, Mr. Freeman, a part of this—it was no doubt carried at the valuation as of years gone by when it was entered in the books. Then there was an assessment levied against some of this stock, in fact, I think there was an indirect one on both of them, but there was a direct assessment on one of them. No doubt when that assessment was made that was charged against the item in the book. It added to the total value of that stock as far as the book was concerned, but it did not—that would not signify that the stock was worth at that time what this account shows here because of those assessments that were levied against that stock which adds the total cost on the debit side of the ledger, and when it was sold to balance the account there was only one way to do it and that was to credit the difference between what was received and what was due on the stock.

The entry in my books stating a valuation of $25,772.50 on account of the 35 shares of stock in the United Bank & Trust Company and 158 shares of Glenn County Bank, which were sold for $13,800, making a net loss of $9,972.00, does not show the valuation of said stock at all and it shows a book account of the stock after the expenses incurred in handling that stock.

(The journal of H. J. Barceloux was introduced in evidence and marked Exhibit No. 15.)

I knew that the sale made in July or in August, 1926, of the Peter Barceloux Company stock which

(Testimony of Henry Barceloux.)

I had hypothecated was going to be made as I had a written notice from Mr. Belieu and I did not attempt to find any bidder to go to that sale and did not give publicity to it any more than is casual and I did not go to the sale and I could not buy the stock in the position I was in at that time. I did not go to anybody else and suggest that the stock was to be [326] sold as there was no use in going and I did not notify any of my creditors that it was going to be sold, and when I went to my sister to get her to take over the United Bank stock and the Glenn County Bank stock I made no effort to find another purchaser and I did not suggest to my creditors that they take over the stock and give me credit on my indebtedness.

As to the one share of the Peter Barceloux Company transferred to my sister I did not attempt to get any of my creditors to purchase it and credit me. As to the transaction of the United Bank & Trust stock, the Glenn County bank stock and one share of the Barceloux stock I did not talk to anyone other than my sister about the shares as I thought it would be useless to talk to anyone and I don't think I talked to George Barceloux about it.

The reason that I made the transfer to my wife was because I needed some money. She was willing to buy it and take her chance and she paid me $1,000.00 and I think she lost $80.00 on the deal.

Subsequent to July, 1926, when I made these transfers to my sister and to George Barceloux I did not transfer the money I had to my son Pierre Marcel Barceloux and I did not carry an account in his

(Testimony of Henry Barceloux.)

name, and during the month of July or August, I don't think I gave him any money, but I gave him money on different occasions. There was money deposited for his use at school and there were certain moneys paid on the $1,000.00 which I owed my son arising from a note for the sum of $1,000.00 I executed on July 9, 1915, to Mrs. Rose Tremely, my wife's mother, and I owed the money to my son under the circumstances that the note had been given to his mother with instructions to collect the money from me when the boy became twenty-one years of age and that is one of the reasons I paid him money and it was not paid until after the month of July. [327]

Cross-examination.

(By Mr. BELIEU.)

At the time I made this payment to the Peter Barceloux Company about July, 1926, none of my creditors were endeavoring to collect any of the debts which I owed them. It is true that I owed the Freeman judgment and there was a joint judgment against me and C. L. Donohue in the former copartnership in the H. J. Barceloux Company. After the judgment became affirmed in the Supreme Court of this state with regard to the payment of that judgment of Mr. Freeman, there was an agreement between my attorney, Mr. Arthur C. Huston, George Freeman and myself, whereby George Freeman was to co-operate with Mr. Huston and myself to get Mr. Donohue to pay his portion of that agreement; I mean of the judgment, and then I was not to hy-

(Testimony of Henry Barceloux.)

pothecate any of my property during that time to protect Mr. Freeman's judgment, so that except the money that I got from Peter Barceloux Company and turned over to Mr. Freeman to apply on the judgment. As to the agreement the matter was carried along and I think they worked together and there was some property north of the Willows and west of Willows that was sold, taken in Mr. Freeman's name, and I paid the money for the amount it was sold for to Mr. Freeman and he held that land,—it was my understanding as collateral, on his judgment. I don't think that the money derived from the sale on property north and west of Willows was applied on the Freeman judgment and I and Mr. Freeman co-operated for the purpose of paying this judgment from 1905 to the first part of 1926. The money that I obtained from Peter Barceloux Company was turned over to Mr. Freeman in partial satisfaction of the judgment. [328] I think I got credit for that on the judgment. Mr. Freeman, during the period commencing with the affirmance of the judgment until some time in 1926, had direct knowledge of my properties and assets. I told him what I had; kept nothing from him. I gave him statements and explained all about everything. He knew everything. I cannot state when I gave the statements to Mr. Freeman, but I think I gave him two.

"Q. Well, what did they comprise?

A. They simply comprised the assets as were shown on the books and at that time I told him that was not correct and there were other assets and

(Testimony of Henry Barceloux.)

there were valuations on that book as they should be.

Q. Incorrect in what respect?

A. Did not have them all in there, and then they were in the books,—there were times a matter was brought up and put into the books as an entry—only the purchase price of a part of the money that was put into the property was put in on the books, the purchase price was not put on the books, so it did not show just exactly how it was, but he knew because I had told him on different occasions just how it stood."

During this period in question I was interested in two or three banks; also in big land deals, rice-growing very extensively; and the operation of farm properties. I also was interested in the following corporations: Sacramento Valley Realty Company, California Midland Company, Pacific National Fire Insurance Company, Finance Corporation of Sacramento, Bank of Orland, Glenn County Bank, and United Bank & Trust Company. The statements that I submitted to Mr. Freeman did not accurately state all of the properties and assets which I have enumerated here, with the various and respective [329] encumbrances thereon. The books were not carried accurately, and I told Mr. Freeman that. All of the times that I was working with him in conjunction with this matter I explained that situation to him as nearly as possible.

I gave to Mr. Freeman as security for his judgment whatever interest I had in the Lake County

(Testimony of Henry Barceloux.)

ranch, which is a range consisting of 5,200 acres in Lake County, upon which there was a mortgage in the sum of $30,000.00. I think said Lake County ranch is worth $125,000.00—it was at that time, I think. Mr. Freeman asked me for an assignment of my interest in this property in June, 1926, and I gave it to him.

(The defendant then offered in evidence the original instrument referred to by the witness as an assignment, which was dated June 30, 1926, and the same was received in evidence and marked Exhibit No. 16.)

At that time I gave Mr. Freeman an assignment of whatever equity I had in the Peter Barceloux Company through an instrument of the same character as the one given in reference to the Lake County ranch. Said instrument was also dated June 30, 1926.

During all of the time that we were negotiating together in reference to the assignment of my interest in the Peter Barceloux Company—that is, my 2,499 shares of stock therein—Mr. Freeman had been told by me on numerous occasions that I owed the Peter Barceloux Company a considerable sum of money, and Mr. Freeman knew it at the time that the assignment was made, and I think that the assignment shows that it was—the equity in that property over and above what was due the Peter Barceloux Company is what I assigned to him. I was shown two instruments which were each signed by me.

(Testimony of Henry Barceloux.)

(Said instruments were offered in evidence by the defendant, and were received in evidence and marked Exhibits No. 17 and 18, respectively.) [330]

The Freeman estate levied an attachment upon my business in November, 1926. He took everything I possessed; attached everything I possessed. By the foregoing statement, I mean that he took possession of my office and all my private papers and everything I had, and I have never had possession of that property since.

After I made this assignment to the Peter Barceloux Company, which is evidenced by that instrument dated April 27, 1926, I continued in my business operations. At the time I made the transfer by the two instruments introduced in evidence here and marked Exhibits No. 17 and 18, I had furnished a complete statement of my assets and liabilities to Mr. Freeman, and Mr. Freeman made the selection of securities which he took. I offered him by way of security for his debt the Pacific National stock and Glenn County Garage stock, and the bank stock, but Mr. Freeman said he did not want them.

I filed my petition in bankruptcy in February, 1927, some three or four months after the attachment levied by Mr. Freeman. At the time of the assignment to Mr. Freeman, he was my largest creditor, and at that time I certainly did not intend to go into bankruptcy.

(Testimony of Henry Barceloux.)

On redirect examination, the witness H. J. BARCELOUX, testified substantially as follows:

The agreement I testified to as being made between Mr. Huston, Freeman, and myself was made during the month of February, 1924, but I do not know the date of it.

Mr. Donohue went into bankruptcy immediately after the Freeman judgment was affirmed by the Supreme Court, but I do not know just when. The agreement made between Mr. Huston, Mr. Freeman, and myself, in addition to what I have already stated, was that I [331] was to pay Mr. Freeman substantial amounts of money at various times upon said judgment in consideration of Mr. Freeman's forbearing to levy an execution against me. In reference to the provision in the Freeman judgment for the sale of certain assets, one-third of the purchase price of which was to be paid to the plaintiff Freeman, and two-thirds of the same to be applied as a credit on the judgment, it was agreed between Mr. Freeman and myself as to what the purchase price would be on the property to be sold, and Mr. Freeman was to buy the property in and hold the same in his name, and I was to pay Mr. Freeman whatever it was sold for in cash. Mr. Freeman and I agreed in advance the amount of the price the property was to be bid in for, and the sum of $2,958.07 was credited on the judgment on account thereof. The property in question was bid in for $4,000.00. I had paid on account of the judgment the sum of $3,000.00 in June, 1925, and

(Testimony of Henry Barceloux.)

$1,000.00 a little later on, and another $3,000.00 after that, and Mr. Freeman still has in his possession something like $2,800.00 or $2,900.00 that he got from the court in San Francisco that he is holding, and he is also holding all that which is still held in his name. There is something somewhere to show the second payment of $3,000.00 on account of that judgment. I think Mr. Freeman will find a check somewhere; I think he got that check when he got the rest of my office. Probably it shows in my books; at least, it ought to show. The statement that you showed me dated June 24, 1926, which was a week prior to the date of the first assignments is the statement I gave Mr Freeman, and I think it was gotten up by Mr. Knowles.

(Said statement was introduced in evidence and marked Exhibit No. 19.)

I didn't authorize Mr. Freeman to find out what the [332] encumbrances were against the various stocks. He wanted to do it and I said, "If you want to do it, go ahead," and I think Mr. Freeman asked me for a letter to the Crocker First National Bank so he could go to them.

The interest of Peter Barceloux in the Cartenberg tract was assigned to the Peter Barceloux Company, but not by a written instrument. I was always under the impression that there was a written assignment, but it may have been only a blank assignment with a lot of other property.

I agreed to pay interest on this Cartenberg account. My father came to me on different occasions when he wanted his part of the profits from

(Testimony of Henry Barceloux.)

the sale of the property and I told him I could not give it to him then, so I agreed to give him interest on any deferred payments. That agreement was made with my father when he was manager for the Peter Barceloux Company. He was manager up to the time of his death, and he handled all the Peter Barceloux Company property. My father died in 1918, and then the sales of the Cartenberg tract properties were handled by the Sacramento Valley Realty Company. They had the sales agency. The Sacramento Valley Realty Company accounted to me for the proceeds from any sale, as I was trustee and the only one they looked to. I think the Sacramento Valley Realty Company continued to carry the Cartenberg account on its books up until 1923, but still I don't know whether it was up to 1923; I think they may have stopped prior to that time; there were no sales going on for some time. There was no thorough accounting by the Sacramento Realty Company after 1913, and after 1923 I guess I took over the sales of those lands myself, because the realty company was not active, but then there were no sales anyhow after that that I know of.

(Mr. BELIEU Questioning the Witness.)

The checks you hand me which were introduced in evidence and marked Exhibit No. 10 were deposited to my account. [333]

TESTIMONY OF CORA P. GELINAS, FOR PLAINTIFF, CALLED AS A WITNESS UNDER SECTION 2055, CODE OF CIVIL PROCEDURE.

CORA P. GELINAS, the defendant, after being duly sworn, testified as follows:

Direct Examination.

(Examined by Mr. GEORGE R. FREEMAN, One of the Attorneys for Complainant.)

My name is Cora Gelinas and I am the sister of H. J. and G. A. Barceloux and the owner of twenty-five hundred shares of stock in the Peter Barceloux Company and have been such owner since the organization of the Company.

I have been a director of the corporation at all times and attend most of the meetings. I am familiar with Certificate No. 5 of Henry Barceloux's for two thousand four hundred ninety-nine (2,499) shares and he also had another certificate representing one (1) share of stock.

I don't remember of having in my possession the shares of stock belonging to Henry Barceloux and I had been the secretary since the organization, and I haven't any recollection of ever having in my possession Henry Barceloux's stock.

I have been the treasurer of the corporation since its organization and I know something about the pledge agreement that was made by Henry to the corporation in April, 1926. I was not there when it was drawn and do not know who drew it and I

(Testimony of Cora P. Gelinas.)

don't remember the date that I first saw it. I don't know that I saw it prior to the date the 27th day of April, 1928, but I saw it on the 27th day of April, 1928, and I don't know why Henry gave a pledge agreement on that particular day, but we had a meeting and Henry had been connected with the corporation for a great many years and I do not [334] remember of any pledge agreement prior to that time. I do not remember whether I saw the pledge agreement signed on that day, but we demanded it from Henry at a meeting, if I remember right, and I do not know the date of the meeting. And when I say we, I mean the Directors George Barceloux and myself and the directors were George, Henry and myself, and at that meeting George and myself demanded it, I think we did, and nothing was said at the same meeting about George securing the other indebtedness to the company. I don't think that was mentioned. I don't remember that I told Henry why I wanted security.

At the time the pledge agreement was signed I had nothing to do with the matter of figuring up the amount of money that was due, and I think I know what was due, and know a part of the indebtedness was due from Henry and George jointly.

I knew Henry Barceloux had been having trouble with you (Mr. Freeman) and I knew there was a judgment against Henry Barceloux, but I don't remember whether I knew of the judgment at the time it was entered, in 1921.

(Testimony of Cora P. Gelinas.)

I was living at Willows in 1921 and was interested in the trial of the action but don't remember when the trial was ended, if judgment was entered, and I guess it was published in the newspaper there, but I don't remember reading it, Mr. Freeman.

George, at my request, went with me to the office of Ware & Ware in Chico and Henry asked me to go with him and I went by Orland and George got in the car. Henry did not tell me what he wanted me to go there for, but I do not remember the date or when I went—I remember we drove over there and went into Mr. Ware's office and there was some discussion—some talk of something—I did not pay any particular attention and they talked for awhile and one [335] of the Wares went out and finally the second Ware went out and then Henry went out and that is all we know, and when I say we, I mean George, myself and Mr. Johnson, and Mr. Ware and his brother and Henry were all in the same room together. I don't know what they were talking about. I don't remember a thing that was said on that day.

Ware & Ware are attorneys at law in Chico.

I did not take any interest to find out what I was there for, and I never heard any discussion that day about an assignment being made to George R. Freeman by Henry of Henry's share in the Peter Barceloux Company, and I do not remember of an assignment being made.

I saw the notice that the corporation had of the fact that George R. Freeman had such assignment, but I do not remember when I saw that. I had

(Testimony of Cora P. Gelinas.)

trouble about the fact, and you (Mr. Freeman) came in to see me one day, and I think you came up to the office for that purpose.

I do not remember, Mr. Freeman, that you told me that Henry had made an assignment to you of his interest in the Peter Barceloux Company and do not remember, Mr. Freeman, whether that was before or after I went to Ware & Ware office and I think you said something about an assignment. I don't remember that we talked about an assignment.

I remember the circumstances of Henry giving me a note of twenty-four thousand dollars odd on June 17, 1925. I was not keeping the books so I don't know why the note was taken at that time. I was a director of the corporation. I had nothing to do with the fact of what was incorporated in the note. Whether we had a note for $2,400.00 in the corporation, I don't know and I cannot [336] remember the date I acquired that note.

George and I discussed the note at one time and we thought he (Henry Barceloux) was getting too much money from the corporation. We knew later that Henry was getting this money for his own use, and whether we found it out prior to the time I got the note, I don't remember.

As secretary or treasurer of the corporation I did not keep the books. My husband kept them until he was taken sick in 1923, July, 1923, I think. I cannot remember dates, and I think Henry took them from that time up to July, 1926.

"Q. Now, then, you were running the sale that was made of the pledged properties? A. Yes.

(Testimony of Cora P. Gelinas.)

Q. Did you attend that sale? A. Yes.

Q. What did you do then.

A. I read the paper—I don't know whether you call it a bill of sale, or what it is—but I read the paper and asked for the bid.

Q. Then what did you do?

A. I read the notice of the sale.

Q. You read the notice? A. Yes.

Q. Do you recall what you said that day?

A. No, I do not. I read what was on the paper; I don't remember what I said.

Q. What else was done there?

A. We stayed there quite a while and I read the notice and it was bid in.

Q. You say it was bid in. How was it bid in?

A. When I called for the bids, I think three times, and nobody bid it in and George bid it in,—there was no one else there.

Q. There was nobody else there?

A. Well, Mr. Belieu and Mr. George Barceloux and myself and I am not sure whether Mr. [337] I. G. Zumwalt was there.

Q. You know that you and Belieu and George were there? A. Yes.

Q. Had you told anybody prior to that time that there was going to be a sale upon that date?

A. No, I did not go around publishing it.

Q. Did you tell anybody?

A. I don't remember that I did."

I remember testifying before the Referee in Bankruptcy.

(Testimony of Cora P. Gelinas.)

(Whereupon Mr. Freeman reads transcript commencing with the question:

"Q. Did you order these notices posted?

A. We did.

Q. Who is 'we'? A. George and myself.

Q. And what else did you do with respect to it? A. I don't remember.

Q. Did you do anything?

A. I don't remember.

Q. Did you go out to the courthouse?

A. Yes, the day it was sold.

Q. What did you do?

A. Bid it in—George did, I didn't.

Q. What was done that day?

A. We went out there with Mr. Belieu and it was sold.

Q. Tell me what was done?

A. We stayed there a little bit and it was sold.

Q. Tell us of your recollection of what was done that day.

A. We stayed on the steps—we stood there, and it was to be sold at a certain time and we waited there a long time and no one came and it was bid in.

Q. How was it bid in?

A. I don't remember how it was done. [338]

Q. Did you offer it for sale?

A. No, I didn't.

Q. Did you say anything about it. Did you do anything at all? A. George bid it in.

(Testimony of Cora P. Gelinas.)

Q. Did you say anything about it at all that day? A. I don't remember that I did.")

"Q. Do you remember those questions and did you give those answers? A. Yes, I did.

Q. What is the fact?

A. Well, I read the bill of sale; that is the fact.

Q. That is the fact. And when did you come to the conclusion that that was the fact?

Well, after I testified. You know, I am not as used to court as some people are, and a person gets bewildered once in a while.

Mr. FREEMAN.—I will read further from the same page."

(Whereupon Mr. Freeman reads from transcript:

"Q. How long were you out there?

A. I don't know just how long. Quite a time.

Q. What do you mean quite a long time?

A. I cannot tell you just the length of time.

Q. Do you know whether it was ten minutes or half an hour?

A. It was more than ten minutes—it must have been an hour.

Q. You don't remember anything about it except you and Mr. Belieu and George were there and George bid it in.

A. I guess that is all.

Q. What did you mean by George 'bidding it in'? A. He bought it.

Q. What did he say? A. I don't know.

Q. Do you remember anything he did.

A. No. [339]

(Testimony of Cora P. Gelinas.)

Q. Did you remember anything—do you remember anything Mr. Belieu did or said?

A. No.

Q. Did you say anything at all that day?

A. I don't remember.")

"Mr. FREEMAN.—Q. You gave those answers, did you?

A. I guess I did."

After I gave the testimony before the Bankruptcy Court I do not remember of having any discussion with either Mr. Belieu or George about what the minutes of the meeting showed and I do not remember anything about the sale prior to the time that it was advertised to be sold. I do not remember what I did about it. Mr. Belieu was my attorney and whether he was my attorney or had been the attorney prior to Henry's resignation I do not remember, and whether I attended the meeting when Henry resigned as president, I don't know and I do not remember whether I was at a meeting on July 28th, 1926, or whether Mr. Belieu was there and I do not remember whether Mr. Belieu was present on August 5th, when we decided to advertise the property for sale and give notice to Henry that it was to be sold.

I don't remember any conversation at any time of anything respecting the sale of this property. I talked over with George the obtaining from Henry J. Barceloux security, but I do not remember when it was and I don't remember talking it over with Henry. I do not remember being present at a discussion between George and Henry about addi-

(Testimony of Cora P. Gelinas.)

tional security and I do not know when additional security was given, but I think I know what it was and I think some fire insurance and Glenn County Garage stock and nine shares of the Orland Bank stock was given and whether Henry Barceloux at that time had anything encumbered other than those three things I mentioned, I [340] don't know, and I don't remember discussing it with him, and I knew he had Orland Bank stock and Glenn County Bank stock and I knew he was an officer of the Glenn County bank. I don't remember asking him at that time for any Glenn County Bank or Orland Bank stocks. I don't remember what happened between the date of the pledged agreement which was April 27, 1926, and June 29th. I don't know who induced me to get Certificate No. 12 issued and I don't remember what happened. I don't remember whether I was there when Stock Certificate No. 12 was issued, but I think I was and I think it was done at that meeting and it seems to me that Henry came over there and I think he had the stock certificate. I am not sure. I think the meeting was held in our store. I do not remember. Since the record does not show a meeting on June 29, 1926, it must have been another date. I know he came over at one meeting and I cannot tell you whether it was on the day he brought the stock certificate there or not and I was there at one of the meetings and I do not remember anything particular that he did. I do not remember the issuance of Certificate No. 12. I knew George had it. I don't remember whether he got it—how he got it or

(Testimony of Cora P. Gelinas.)

where he got it. I saw it in the stock-book which I had. I do not remember Henry being there and I remember that I saw it in the stock-book and that George had it. I do not remember why on August 5th the corporation decided to give notice to Henry that they were going to sell the stock. At that time Henry and I were not on very good terms on account of the money and things. I did go with him to Ware & Ware's office on his request, but why I went I don't know.

"Q. Why didn't you notify me (Freeman) that you were going to sell that stock on August 16th? [341]

Mr. BELIEU.—Object to that as immaterial.

Mr. FREEMAN.—A mark of good faith.

Mr. BELIEU.—Well, you got all the notice the law—

The COURT.—Well, if she had any reason in addition she might answer it. Overruled.

The WITNESS.—Well, I don't know. We did not talk to anybody; just the notices had been printed in the paper and posted out.

Mr. FREEMAN.—Q. It was not printed in the paper, was it?

A. I don't know, Mr. Freeman.

Q. Now, subsequently on September 1, you sold that stock to George Barceloux, didn't you? Did you know anything about that?

A. Yes, I think I did.

Q. You remember that you did sell all the stock that was purchased at the sale to George Barceloux?

A. Yes.

(Testimony of Cora P. Gelinas.)

Q. And took his note? A. Yes.

Q. For the full purchase price, is that correct?

A. The company took his note."

After the sale on the 16th day of August, 1926, I had another transaction with Henry about some bank stock. He was indebted to the United Trust Bank in Sacramento and the Peoples' Bank and they were going to close him out and he asked me if I would take a loan and buy the stock that he had and I thought it over and I was not very anxious to do it, but after I looked into it I thought I would come out all right, so I bought it from him, and there was 158 Glenn County Bank shares and 26 United Trust shares and I think 35 rights. I did not consult George before I bought it and I don't think I consulted with anyone else about it. I learned that the amount of his indebtedness was $13,800.00 and Henry and I went [342] to Sacramento together and put the deal over and I paid him $2,000.00. I cannot tell you just where I paid it, but I can tell you where the checks were issued and on what banks and the amount and I cannot state exactly just where it was paid, only it was not paid in Sacramento, and when we went to Sacramento we went to two banks. Part of the stock was hypothecated in one bank and part in another and I asked just about how much it was worth and I asked them—I don't remember who it was—I asked Henry and Henry told me it was worth around $100.00 or $125.00.

I don't think we discussed the Glenn County Bank because I had stock of my own and knew

(Testimony of Cora P. Gelinas.)

pretty well what it was worth, and at the time we made this deal the value of the Glenn County Bank stock was below par and the par value was $100.00 and we sold it for $70.00 so it could not have been very much, and at the time I made this deal with Henry Barceloux I thought it was worth about $75.00 or $80.00 and I figured the United Bank & Trust Company stock between $100.00 and $125.00, and I agreed to pay Henry $2,000.00 cash and assume his indebtedness. The total number of shares in the United Bank & Trust Company was 26, I think, and at the time I don't think the rights were worth what the stock was and I did not make any investigation after that. In my estimation they were worth about $10.00.

I don't know the value of those stocks but at that time I had some idea and the ideas I have given you now were the ideas that I had at that time, and we sold Glenn County Bank stock for $70.00 and $75.00 was what I figured when I was dealing with Henry. I did not figure it all out, I just thought I could carry that loan and come out all right. At that time in August, 1926, I was a director [343] of the Glenn County Bank, but I did not know at that time there were negotiations pending between the Glenn County Bank and the Bank of Italy for a sale—there were negotiations but there was nothing certain. I cannot say definitely at that time that the Bank of Italy would buy Glenn County Bank stock at $70.00 a share. I don't remember but I don't think it was a definite thing and I did not take into consideration that fact when I bought

(Testimony of Cora P. Gelinas.)

this stock of Henry Barceloux in these two banks, and I was not on any investigating committee for the Glenn County Bank, and we had meetings and would talk it over, but you know you cannot tell whether a deal like that is going to go through or not.

On August 28th or July 28th the day Henry Barceloux resigned as president he had one share of stock left of the Peter Barceloux Company, and I bought it from him for $10.00, which I paid by check, which I have, but not with me. I don't remember, but kind of think it was paid at my office, I don't know, and I think it was after Henry resigned as president of the corporation, and he wanted to sell it and I would not give him any more for it because I did not think it was worth any more. I don't know what it was worth and I don't think you could put any value upon corporation stock of that kind, and I knew what the corporation owned at that time, and I have had access to the books at all times, but I don't know how much money the corporation had at that time—I did not keep the books. I was a director and made inquiries, but it is hard to remember just at certain times how much money was in the bank. As treasurer at times I looked over the bank-book of the corporation, and when I say on July 28th, 1926, that a share of stock of the Peter Barceloux Company was not worth more than $10.00, I did not think it was because we were not getting any revenue out of that company as long as mother lives, [344] we are not getting any revenue out of it. I cannot tell you

(Testimony of Cora P. Gelinas.)

why we bought in the stock of the corporation, the 2,499 shares for $35,000.00.

I think the certificate for that one share was delivered to me at that date and I don't think the matter was discussed with George prior to the time I took it over. I don't remember of anyone being present or anybody else at the time I bought it. I don't remember that in my verified answer I allege that Henry Barceloux sold that share of stock to me for $25.00 and that $25.00 was a reasonable value for it, but I know my check is $10.00, and that is what I paid him.

Cross-examination.

(By Mr. BELIEU.)

I have been a director of the Peter Barceloux Company since its inception and attend all its meetings and take an active part in the management of the concern.

The Glenn County Bank stock which I purchased from Henry and also the United Bank & Trust Company stock was held by the bank down there as security as collateral in the United Bank & Trust bank in two loans, of which the United Bank & Trust held a $7,800.00 loan and the People's Bank in Sacramento the $6,000.00 loan.

The first bank the obligation was $7,800.00 and I think there was 50 shares of Glenn County Bank and 26 shares of the United Bank & Trust and one bank held one set of securities and the other bank the other set. I think the United Bank & Trust Company secured the $7,800.00 loan. I get them

(Testimony of Cora P. Gelinas.)

kind of mixed and I don't remember who held 100 shares of Glenn County Bank or the 50 shares or 26 shares, and I think the 26 shares were held by the People's Bank of Sacramento and there was $6,000.00 against it. I had to give the bank a statement [345] and more collateral and I had to give them a financial statement in order to take it over and give them more security and more collateral.

The Henry Barceloux note which he had with the respective banks when they took the stock over, I guess they gave it to him and I gave my note to the United Bank & Trust Company and one to the Peoples Bank. I gave two notes, one for $6,000.00 to the Peoples Bank and $7,800.00 in the United Bank & Trust, and I gave 26 shares of City Service and 41 of Tide Water Associated Oil as additional security to these banks and as for the $6,000.00 obligation I think there were 100 shares of Glenn County Bank and 41 of Tide Water Associated, and the obligation for $7,800.00 was secured by the City Service and by 25 or 26 shares of City Service and by—I have got them confused I don't know whether 100 shares of Glenn County or 50. At any rate I bought the stock from Henry and gave him $2,000.00 in cash and borrowed $13,800.00 from those two banks and give additional security therefor, and I have a check in my hand which I gave to Henry Barceloux on the Bank of Orland for $600.00 and one on the Glenn County Bank for $1,400.00 and these two checks amounting to $2,000.00 were given for the purpose of buying Henry's interest in the stock.

(Testimony of Cora P. Gelinas.)

Redirect Examination.

(By Mr. FREEMAN.)

I don't imagine it was more than a week prior to the date of the check I negotiated with Henry about this matter and I cannot say because the banks had to look into my financial statement before they would give me an answer. I imagine it was about a week. [346]

(It was at this time stipulated by the parties that the judgment in the case of Freeman vs. Charles L. Donohoe and H. J. Barceloux was filed July 25, 1921, recorded on the same date, in Book 6 of Judgments at page 1, and that a remittitur was filed from the District Court of Appeal on February 26, 1924, affirming the judgment in that case and the sum total of the judgment was $47,260.31, and bearing interest at the rate of 7 per cent; that George R. Freeman is the duly appointed, qualified and acting administrator of the Estate of Frank Freeman, Deceased.) [347]

TESTIMONY OF JOHN H. GRAVES, FOR PLAINTIFF.

JOHN H. GRAVES, after being duly sworn, testified as follows:

Direct Examination.

(Examined by Mr. GEORGE R. FREEMAN, One of the Attorneys for Complainant.)

I am in the title business and reside at Willows, California, and have been in the title business about

(Testimony of John H. Graves.)

twenty-five years in Glenn County and I am an Inheritance Tax Appraiser for Glenn County and I am familiar with the properties belonging to the Peter Barceloux Company—the real properties, and I have had occasion in the year past to appraise those properties and I am familiar with the home ranch, consisting of about 2,100 acres and knew the property on the 27th day of April, 1926, and on several occasions as a title man and inheritance tax appraiser kept track of the sales and transfers of the real property of the quality of the land described as the home place. I am of the opinion that the market value of the home place per acre on the 27th day of April, 1926—about 1,000 acres of it, I would put it $40.00 or $50.00 an acre and the other 1,100 about $75.00 to $100.00 and I know the Longmire Ranch, it contains about 1,240 acres less the Railroad Right of Way, and I had an option on it on that same date and the value of it on that date was about $75.00 to $100.00 per acre. I know the Barceloux Building in Willows and on that date the market value in my opinion was around $30,000.00 to $35,000.00 and the garage adjoining the building on Butte Street on that date was five or six thousand and the home residence belonging to the Peter Barceloux Company on that date was valued at about five thousand. [348]

The Florence house belonging to the Peter Barceloux Company is worth about $1,500.00 or $2,000.00.

The Blakeley land east of the railroad on the Cartenberg subdivision—the north end is pretty fair

(Testimony of John H. Graves.)

land but the rest of it is not very good. I know the Dunlap land of 10 acres belonging to the corporation and the value of the 10 acres on the 27th day of April, 1926, was 75.00 an acre. The south part of the Cartenberg tract east of the railroad—40 acres of it at that time I would not put at $25.00 to $30.00 an acre.

I know the north Willows lot owned by the corporation and they are not very valuable and I suppose are worth $30.00 to $50.00 a lot—I do not know how many lots they had.

Cross-examination.

(By Mr. BELIEU.)

I do not know any land in the immediate vicinity of the hog ranch as you describe this 1,000 acres that has sold in the last year or two for $40.00 or $50.00 an acre. About that time, or shortly before that the Newlands land was appraised for $80.00 or $85.00.

I don't know of any sales in that particular locality, and I don't know of anything sold out there in the last two or three years in the neighborhood of the home place. There has been several pieces in our neighborhood sold for cash. [349]

TESTIMONY OF W. K. HATCH, FOR PLAINTIFF.

W. K. HATCH, after being duly sworn, testified as follows:

Direct Examination.

(Examined by Mr. GEORGE R. FREEMAN, One of the Attorneys for Complainant.)

I am a banker with the Bank of Italy and I was with the Glenn County Bank in 1926 and the Glenn County Bank subsequently sold out to the Bank of Italy. Prior to that time I had been with the Glenn County Bank, since 1912.

The stock of the Glenn County Bank was not a listed stock. I know the book value of the Glenn County stock and what it was the month of July and August, 1926, I mean the Glenn County Bank stock and at that time the book value of the stock was about $116.00 and I think the negotiations started for the sale of the assets of the Glenn County Bank to the Bank of Italy in 1926, and when these negotiations were started in June, 1926, H. J. Barceloux was an officer of the corporation of the bank—he was the president, but did not take any part in the negotiations, in the middle of June, 1926, for the sale of the bank.

The sale of the bank assets was discussed with the directors before we got in touch with the Bank of Italy and he did not take any part in it until the fall when we had a contract prepared and I believe he attended the Board of Directors' meeting when the negotiations were discussed.

(Testimony of W. K. Hatch.)

I do not remember that in July, 1926, the Board of Directors appointed a committee consisting of myself, Mr. Barceloux and Mr. Geis to conduct the negotiations, and I think I took care of the arrangements and I do not remember them appointing a committee. I do [350] not know that Mr. Barceloux was on a committee for that purpose and I don't remember that he was, and I think I started the negotiations with the consent of course of the Board of Directors, and I conducted negotiations as early as the month of June, 1926, under the direction of the board and I kept the board advised of the negotiations and I supppose I advised Mr. Barceloux personally of those negotiations as he was a member of the board, and in the month of August nothing was done toward the sale of the bank assets to the Bank of Italy.

We examined the bank in July and the deal did not close until October and there were negotiations with them during that period. I think about the 10th day of August, 1926, we arrived at a total value of the bank stock. I don't recall the exact date and the final purchase price of the bank stock was $125.00 a share and there were reservations in respect to that price and we got $70.00 cash and $50.00 a share to be held out until guaranteed items were collected. [351]

TESTIMONY OF GEORGE M. KRAMER, FOR PLAINTIFF.

GEORGE M. KRAMER, after being duly sworn, testified as follows:

Direct Examination.

(Examined by Mr. GEORGE R. FREEMAN, One of the Attorneys for Complainant.)

I reside in Sacramento and my business is banking and I was vice-president of the United Bank & Trust Company in the month of August, 1926. I was such officer about four years and I am still associated with its successors.

The United Bank & Trust Company did not have any listed stock in the month of August, 1926, and from my remembrance of sales made the market value of that stock on August 24, 1926, was about $165.00. [352]

TESTIMONY OF B. F. VANDERBURG, FOR PLAINTIFF.

B. F. VANDERBURG, after being duly sworn, testified as follows:

Direct Examination.

(Examined by Mr. GEORGE R. FREEMAN One of the Attorneys for Complainant.)

I was treasurer of the, Pacific National Fire Insurance Company during the year 1926 and during that year there were sales of the corporate stock,

(Testimony of George R. Freeman.)

during the month of June, July and August of that year and the market value of the stock at that time was approximately $5.00 a share. [353]

TESTIMONY OF GEORGE R. FREEMAN, FOR COMPLAINANT.

GEORGE R. FREEMAN, after being duly sworn, testified as follows:

Direct Examination.

(Examined by HORACE B. WULFF, One of the Attorneys for Complainant.)

I am the qualified authorized and acting administrator of the estate of Frank Freeman, my father, and who during his lifetime was a partner of Henry Barceloux, the bankrupt in this case.

The partnership commenced in the year 1907 and was dissolved on June 1st, 1910, and at that time there was no accounting between them, and an action was subsequently commenced in May, 1914, and I was one of the attorneys in the action, and Peter Barceloux, the father of the bankrupt was in court during the trial of the case, several times.

The judgment in the case became final in 1924. The judgment became final about the 24th day of February, 1924, and Donohoe, the other defendant in the case, immediately filed a petition in bankruptcy.

Barceloux and his attorney, Arthur Huston, came to me and suggested that we all work together in trying to make Donohoe pay his portion of that in-

(Testimony of George R. Freeman.)

debtedness. They both stated to me at that time it was Barceloux' full intention to pay the judgment, but he wanted my assistance in running down Donohoe to make him pay his half. It was agreed he would make substantial payment from time to time on his judgment in consideration in my forbearance in having execution issue. That agreement was kept and the payments that are outlined in my answer here were made on that judgment. One $1,000 payment in 1924; one payment of $3,000 in 1925 and no other payments [354] have been made. It was agreed at the time that we sold the property under the judgment that Barceloux would put up the amount we agreed upon in advance was the value of the property. Two-thirds of the purchase price was to be applied on the judgment and it was applied. I bought the land in my name with the understanding with Barceloux, who, being engaged in the real estate business, he would try to sell it at one figure in order to get a better credit out of his part of the judgment. We maintained that agreement in force until the month of June, 1926, at which time I told Barceloux that I could not any longer go along without additional security on that judgment. I already had a judgment lien on the ranch in Lake County. I asked him to give me a trust deed on that property which trust deed is in evidence here, as cumulative security on that, so I could sell under that rather than under the judgment. He gave me that.

In June, 1926, I did not have any notice that the

(Testimony of George R. Freeman.)

Peter Barceloux Company held the stock of Henry J. Barceloux as security for any indebtedness other than his statement to me that they had his stock as collateral for a loan or for a note of about $24,000.00 because he had previously given me a statement showing his indebtedness in $24,000.00 about.

At the time I was conferring with him with reference to obtaining the assignment of the Peter Barceloux Company stock he did not offer me any other security. Well, I will recall that. We had gone to the various banks who held his stocks to find out the amounts that were against them. He told me he did not want me to take the bank stock, even if they were not hypothecated because he was president of the bank, and it would not look good for him. I told him I did not want those things, anyhow, because of the fact that they were hypothecated for large amounts, but that I would prefer to have the Peter Barceloux Company stock. I did not refuse, [355] Mr. Wulff, to take anything, however.

He did not offer 75 shares of the Pacific National Fire Insurance Company stock, 100 shares of Glenn County Garage stock, and 9 shares of Bank of Orland stock.

I am acquainted with the Glenn County Garage and I was president of the company and I know the market value of that stock during the months of June, July and August of the year 1926 and I would say the market value during these months was between $8.00 and $9.00 a share.

(Testimony of George R. Freeman.)

I was attorney for Henry J. Barceloux, the bankrupt, in matters involving the Sacramento Valley Realty Company and the California Midland Realty Company and after Mr. Barceloux and I made this agreement to try and work out Donohoe's half of this judgment, I represented him in two or three suits against the California Midland Realty Company and I made an investigation of the financial status of those companies at that time and I would say they had no financial status of any kind and a Receiver of the Sacramento Valley Realty Company was appointed in 1923 and acted as such for a year or two.

In the year 1926 between the months of April and August, 1926, the Sacramento Valley Realty Company owned all of the stock of the California Midland Realty Company, a subsidiary, which held the greater part of the properties that were involved, and these properties were subject to mortgages and the payments had not been made on them and the irrigation and reclamation districts foreclosed proceedings and Henry lost the property.

The property was all sold prior to the year 1926.

I am acquainted with a Hindu named Chann Singh and have known him since 1918, and I know his financial condition. His status in the year 1920 that is the year of the rice failure Chann Singh [356] along with the rest of them went broke, and the judgment held by the bankrupt against him in the amount of $1,577.91 is not collectible.

I am also acquainted with a Hindu named Anoma Singh. He is a laborer and I have known him for

(Testimony of George R. Freeman.)

six years and from 1920 to 1926 worked in the ricefields as a laborer. I know nothing of his financial status other than he owned no property that we could find at the time we investigated his status, and we investigated whether the judgment held by the bankrupt against Anoma Singh in the sum of $2,898.00 was collectible, and as a result of the investigation it was found not to be collectible.

I am familiar with the Aden Ranch in Lake County and have been on the property and made an investigation of its market value. I discussed this property with the assessor of the county and talked to owners of adjoining lands and to the man who was operating the property and to the man who formerly owned the property prior to the time the Barceloux Bros. acquired possession of it.

Through my investigations I ascertained that in 1926 sales were not made of property in that neighborhood, and from my investigation the market value was sixty or sixty-five thousand dollars at the outside and this same property is now involved in litigation in a suit brought by George Barceloux against Henry Barceloux and myself to quiet title and the action was tried last September and has not been decided on account of illness of the Judge.

It is contended by the plaintiff in the case that he owned property and that Henry Barceloux had no interest in it and that I had no interest in it by reason of Henry's trust deed to me and the action is still pending.

In reference to the assignment by Henry Barce-

(Testimony of George R. Freeman.)

loux to me of his Peter Barceloux Company stock, on June 30th, I prepared an agreement which was to be signed by the Peter Barceloux Company, and after [357] I prepared the agreement I gave it to Henry Barceloux for the purpose of having it signed by his brother and sister, and he agreed to have it signed, and the next time I heard anything with respect to that agreement was when Ware & Ware called me on the telephone, I think the first day of July or 30th day of June, and the substance of the conversation was Henry and his brother and sister were there for the purpose of discussing with him the notice that was to be given and the agreement that was to have been signed, and they prepared a redraft.

The letter you show me I received from Ware & Ware about the 2d day of July, and the letter reads as follows:

"George R. Freeman, Esquire,
Attorney at Law,
Willows, California.

Dear Mr. Freeman:

We are herewith enclosing redraft of your demand upon the Peter Barceloux Company and a statement of the amount of advances secured by the pledge of the Henry Barceloux stock for the secretary to execute and deliver to you. The amount of the advances not evidenced by notes of H. J. Barceloux we were unable to supply due to the fact that Mr. George Barceloux stated it would take some little figuring to ascertain the amount as

(Testimony of George R. Freeman.)

of the date of the certificate of the secretary. We told him to ascertain that amount and fill it in in the blank for that purpose.

You will also find enclosed copy of instructions that we have prepared relative to the endorsement of Henry Barceloux's stock to you. You will likewise find copy of entry we have suggested that the secretary make upon the stub-book entry of Certificate #12, showing that the interest of H. J. Barceloux was assigned to you in 2494 [358] shares of the stock of the corporation. We believe that these endorsements are strictly in conformity with the provisions of Section 324 CC and will protect you, and we assure you that it is our desire that they do this. Mr. Gelinas or Mr. George Barceloux, will no doubt call on you within the next day or so and complete the evidence of your interest in this stock in conformity with the suggestions that we have made.

Shortly after we called you up on the telephone Mrs. Barceloux called to say that your Mr. Wood had just been in at Barceloux's office and was in some way much excited over this matter. We want to assure you again, as we did over the telephone that there is absolutely no disposition on the part of either Henry Barceloux or the Peter Barceloux Company to deny you every protection and right that you are entitled to under your assignment. When the demand was made upon the Barceloux Company that the stock certificate should be issued in your name, those interested did not understand at all the legal effect of what you are

(Testimony of George R. Freeman.)

trying to do and that you are merely trying to protect, in a necessary way, your interest in view of the provisions of Section 324 CC. Of course, the Barceloux Company is entitled to its rights as pledgee of this stock. In this connection we want to say again, as we told you over the telephone, that before your assignment was ever made a proper entry on the books of the company was made showing the pledge of this stock. This was done at our suggestion, though, of course, under the law, as you had notice of the pledge you could and did acquire no rights superior to the rights as pledgee of the Peter Barceloux Company even though there had been no entry [359] at all of the pledge in the books of the corporation and the stock was, as a matter of fact, endorsed by Henry Barceloux at the time he got the first advancement from the corporation and was delivered to said corporation as a pledge and has actually been in its possession as such ever since.

Again referring to the matter that we discussed over the telephone, we want to assure you that we have tried in every way we can to impress upon Mr. Henry Barceloux the obligations placed upon you as administrator of your father's estate and the necessity of action in the bankruptcy matter to the end that the action against the Donohoe Company be vigorously and promptly prosecuted. Will you, therefore, notify us of the first opportunity presented to press that matter. Clearly, the only hope for Henry Barceloux to escape the payment of the

(Testimony of George R. Freeman.)

judgment held by your father's estate, is to see you, as a creditor of the Donohoe bankruptcy matter, paid upon that judgment, and we believe that he fully realizes this and appreciates the necessity of prompt and vigorous action in the Donohoe bankruptcy matter.

We do hope that you will continue the forbearance that you have shown in this matter as against Henry Barceloux until the action against the Donohoe Company can be tried, and we again assure you that we are willing to proceed in this matter just as soon as you give us the word.

With all good wishes,

WARE & WARE.
By PHIL WARE."

Neither Henry Barceloux nor Mrs. Gelinas called upon me as was suggested in said letter. I heard nothing further in reference to that agreement. I identify the letter, Mr. Wulff, that you [360] hand me, and I received it from Ware & Ware. The substance of one of the paragraphs of the letter is as follows:

"Mr. WULFF.—Q. Did Henry Barceloux or Mrs. Gelinas call upon you as stated in said letter?

A. George or Henry?

Q. Cora Gelinas? A. No.

Q. Did you hear anything further in reference to that agreement? A. No.

Q. I hand you this letter and ask you to identify that, and if it was received from Ware and Ware?

A. Yes.

(Testimony of George R. Freeman.)

Q. It is another letter from Ware & Ware.

The COURT.—Just state the substance of it.

Mr. WULFF.—The substance of the letter—I will read one of the paragraphs here.

(Reading:) 'In regard to the actions of the Peter Barceloux Company relative to the assignment of Henry Barceloux's interest therein and the carrying out of the suggestions contained in our letter to you of July 1, 1926, will say that we are powerless to do anything in the matter. We fully expected when we wrote you under date of July 1st, that the suggestions made by us would be followed. We have not seen either Mr. George Barceloux or his sister, Mrs. Gelinas, since they were over here about July 1st, and they are not counseling with us in regard to the attitude of the corporation relative to this matter. We have understood thru Mr. Henry Barceloux that they took offense at your proposal to have them execute a written agreement which you prepared in regard to the Henry Barceloux stock.

Very truly yours,
WARE & WARE,
By PHIL WARE." [361]

(Said letter was introduced in evidence and marked Plaintiff's Exhibit No. 21.)

In July, 1926, I talked with Cora Gelinas with reference to my assignments and I went over to see her in reference to the assignment Henry had given me and told her that it had no purport other than getting protection for the estate in having

(Testimony of George R. Freeman.)

that assignment made and have them acknowledge notice of the fact that I had it.

I did not receive any notice of any sale under the Peter Barceloux Company pledge agreement and my first actual knowledge of the sale of said stock was in the month of September of the year 1926.

I am acquainted with G. A. Ostrum and Mr. Ostrum is a rice grower and he has no financial status and the claim of bankrupt for $3,500 against him is not collectible.

Cross-examination.

(By Mr. BELIEU.)

I only remember one visit to Mrs. Gelinas' store and do not recall going to see her or George Barceloux other than the one visit. Whether the exhibit which was introduced here yesterday with regard to them acknowledging the notice, the receipt of assignment, I don't know whether that was the one or not and the one that I had provided that they acknowledge receipt of notice of other assignments agreed they would not foreclose the pledge against the property without giving me at least ninety days notice and if that is the one in the record that is the one I took.

I don't recall that the one I presented to her on that occasion left blank the matter of the amount of the Peter Barceloux assignment. If that instrument which had for its purpose receiving the notice of the Peter Barceloux Company of your assignment was left blank as to the amount I expected that

(Testimony of George R. Freeman.)

the true amount of their [362] indebtedness would be inserted in that document.

Previously Henry had told me that he owed the Peter Barceloux Company some twenty-four thousand dollars and the amount appeared in the statement he gave me as of June 24th, 1926, that is in the statement which he had stated to me of his assets and liabilities, and I went over the statement that he gave me and that statement pretended to be a statement of all the property he owned, and included all bank stock and the Lake County Ranch and his interest in the Peter Barceloux Company and his interest in the Hindu judgment and various judgments, and I asked him to give me the Peter Barceloux Company stock and he was president of the Glenn County Bank at that time and he did not want me in the first instance to take his bank stock and in the second instance I did not want it because it was hypothecated as security and there was more value in the Peter Barceloux Company stock in my opinion and that is what I asked for, and I did take that, and I took a trust deed to his half-interest in the Aden ranch. I made an investigation as to the equity in his other stock and Mr. Barceloux authorized Mr. Davis who was then in my employ to go to the Crocker Bank and get a proper statement there and I personally called upon the People's Bank and United Bank & Trust Company to find out the condition there. I did not ask him for that security and we discussed that matter, and, as I told you, he being the president of the bank,

(Testimony of George R. Freeman.)

did not want his bank stock hypothecated, and I told him it would be satisfactory if he would assign to me his interest in the Peter Barceloux Company and he told me it was subject only to the $24,000 note that appeared in that statement.

My reason for not placing in that notice to the Peter Barceloux Company to receipt, i. e., acknowledging receipt of my assignment the sum of $24,000.00 which I understood the debt of the [363] Peter Barceloux Company to be, was probably because of my telephone communication with Mr. Ware about the whole matter and there was something else to be considered. I think probably that there were other obligations which he owed the Barceloux Company which were to go in the notice of assignment, and I understood that. At the time I made the investigation of the assets and liabilities of Henry Barceloux and taking his values I could not conclude other than that he was solvent and I so concluded. I did not have any knowledge of all these other things that appeared subsequently in the bankruptcy proceeding. I knew that he owed the Crocker First National Bank with George Barceloux $48,000.00 which was secured by bank stock and I also knew he owed the same bank $16,000.00 which was secured by bank stock. I knew what appears on this statement plus his statement that the bank stocks that are placed on here were pledged, and I also knew about the $83,333.00 valuation on the Sacramento Valley Realty Company stock was not worth anything and I unquestionably so stated to him. I did not know that he person-

(Testimony of George R. Freeman.)

ally owed his brother, George Barceloux, some money. I had been bankrupt's attorney in two or three litigations and I had an action for him against the California Midland Realty Company on account of the promissory note by the Sacramento Valley Realty Company in which I recovered judgment of $21,000.00, and then I was interested in some actions involving a rice crop and finally I withdrew as attorney for Mr. Barceloux in that matter and Mr. Huston represented him and I represented the tenant.

Mr. Huston and myself were collaborating after the affirmation of this prior judgment for the purpose of collecting Donohue's half of the property, and it was understood we were to work together for the purpose of trying to make Donohoe pay his part of it under the understanding that Barceloux was not to change [364] the character of his property until that was collected.

I knew generally of all of Barceloux's judgments, but I did not know generally of all his assets, activities and liabilities. The fact of the matter is I did not. Henry Barceloux did keep faith with me in respect to endeavoring to collect the Donohoe part of the judgment, inasmuch as he could do and Huston and I were doing all the work, and he was assisting me in any way he could to help me and Mr. Huston to collect the Donohoe portion of the judgment, and he continued to do so as long as anything could be done. It very soon became patent there were no assets in the suit commenced by the trustee of the Donohoe estate against the Donohoe

(Testimony of George R. Freeman.)

corporation and the assets were all involved in a Government irrigation district that had no particular value, and it was very apparent we were not going to make any recovery. During all of these times as far as I know, I was the only creditor of Henry Barceloux that was active at all in endeavoring to collect anything against him. I knew of the foreclosure suits against the Sacramento Valley Realty Company and those suits were not against Henry Barceloux individually, and I also know the reason for those foreclosure suits was because of the fact that Donohoe and H. J. Barceloux were in litigation and the corporation was in the hands of a Receiver and all of the time I was co-operating with Henry in an effort to collect my judgment as best I could.

As a result of the understanding and agreement with me I made an assignment of the Peter Barceloux Company stock and that assignment had his interest in the Aden ranch.

I did not know of the sale of the stock of the Peter Barceloux Company and my recollection is I learned it some time in September and I might recall to your attention something in connection with that. [365]

After Mrs. Gelinas refused to acknowledge receipt of my assignment, which assignment has been introduced here, I wrote the Peter Barceloux Company a letter upon the 3d day of July, 1926, about the very fact that I had an assignment and that they should take notice of that fact and I did nothing after that; there was no pursuit necessary. As

(Testimony of George R. Freeman.)

to whether if present at the sale of this stock, I would have paid the amount of their claim against it is a matter that would have had to be determined at that time and what I would have done I think that is entirely immaterial and a conclusion on my part. I knew that this was a family corporation but not that all the stockholders of the corporation were borrowing money from the corporation, and all I knew was what Henry told me about it. I did not know George was indebted to the corporation, but I knew what Henry owed the corporation from what Henry told me, $24,000.00, and I did not know all about Henry's business. I did not know that he borrowed a number of dollars from the corporation to pay me and I had no knowledge where he got the money he paid me, and all he paid me was on the $2,900.00 of about $4,000.00 that he paid at the time we agreed upon the valuation of the property sold under that judgment and then he paid me $1,000.00 subsequently in that year and $3,000.00 the next year and that is all he paid, and whether he paid all he owed me I don't know.

I knew that the stock would be minority stock as it was one-fourth of the stock. I did not know of the contents which was made between Peter Barceloux Company and Peter Barceloux and his wife, dated the 9th day of July, 1912, whereby they reserved all of the earnings of the corporation during their lifetime and I know that Mrs. Barceloux is still alive. [366]

(Testimony of George R. Freeman.)

Redirect Examination.

(By HORACE B. WULFF.)

At the time I was negotiating with Mr. Barceloux for assignment of the Peter Barceloux Company stock he told me the value of that stock and he told me he had a substantial equity therein and that is the reason I did not ask for additional security and the reason I took that stock he showed with the different statements he gave me that it was valued at $80,000.00 and I knew generally what the Peter Barceloux Company's assets were, and he stated that he owed $24,000.00 on it and I concluded the difference between that was more substantial than anything else that Barceloux owed. At that time I did not know, June, 1926, that Henry Barceloux was indebted to the Peter Barceloux Company in the sum of $1,750.00 upon a note for $3,500.00 signed by he and George Barceloux, and I do not know for what obligation the stock was eventually sold for. I took the assignment of contract upon the Lake County ranch and to the Peter Barceloux Company stock at the same time because I wanted ample security for this obligation.

The Complainant rests. [367]

DEFENDANT'S CASE.

TESTIMONY OF GEORGE BARCELOUX, FOR DEFENDANT.

GEORGE BARCELOUX, after being duly sworn, testified as follows:

Direct Examination.

(Examined by PERCY NAPTON, One of the Attorneys for Defendant.)

The value of the Barceloux property in April, 1926, was around two hundred twenty to two hundred twenty-five thousand dollars.

At the time of the pledge agreement between the Peter Barceloux Company and H. J. Barceloux I know of my own knowledge that H. J. Barceloux had other property, in 1926.

Cross-examination.

(By Mr. FREEMAN.)

After Henry Barceloux pledged to the corporation in 1926, he had bank stock, insurance stock and interest in some land—had pieces of land. I do not think all the stocks coming into the possession of the Barceloux Company were encumbered. We got 134 shares of Bank of Orland belonging to Henry from the Crocker National Bank and none of that stock was collateral for the $16,000.00 note and the $16,000.00 note was secured by 64 shares of the Bank of Orland and the Hembree note of $2,500.00. There was 134 shares up as

(Testimony of George Barceloux.)

security on the $48,000.00 note and 64 shares on the other note, making 198 altogether and we got 9 shares more of the Bank of Orland by his second assignment in the month of July, 1926, and I think that made 207 shares.

I do not know how much stock he had in the Glenn County bank at the time he made this pledge agreement, but I knew he was a stockholder and had a bunch of shares in there, I don't know exactly the number. He had besides the Pacific Insurance, Glenn [368] County Garage, and Pacific Finance Company—Glenn County Garage stock and he had different pieces of land and he had some stock in the Realty Company. He had stock in the Sacramento Valley Realty Company, but I do not know what the value of that stock was on the 27th day of April, 1926. He had some land up there north of Willows, west of Willows and east of Willows. I do not know definitely whether he had land on the 27th day of April, 1926, as I never examined the records.

GEORGE BARCELOUX, recalled for direct examination.

The stock that was bought at the pledge agreement sale I turned back to the corporation—some of the minority stockholders thought I ought to turn it back and I turned it back and I received my note back and I gave them back all the same stock I bought, the 2,499 shares of the Peter Barceloux Company, 75 shares of Pacific Fire National, 9 shares of Glenn County Bank and 100 shares of

Glenn County Garage and the minutes will show that, and at that time I got my note back.

Cross-examination.

At the time according to the minute-book I bought that stock from the corporation I pledged it back to the corporation and gave it my note for $36,-500.00 and the company retained possession of the stock and the company had possession of the stock and all this stock was pinned right to the note, my note and all of this stock, all the Peter Barceloux assets of that nature were held together in a wallet of the Peter Barceloux Company and which wallet was in the Bank of Orland vault.

I am still connected with the Bank of Orland and have access to it at all times. The turning of the stock back to the [369] corporation was not done only by destroying my note and if you will look in the books you will see the minute entry affecting it. I took the stock—I mean the note was handed to me and they retained the stock and I don't know whether I destroyed the note and the stock is now in a wallet with the Peter Barceloux Company's papers. I think the sale was canceled at a meeting held at Willows on May 11, 1928, and directors present were Cora Gelinas and Elmer Barceloux and that the records show that that was the time that it was done and up to that time it was with the Peter Barceloux Company's papers.

May 11, 1928, was not after the commencement of this action. [370]

TESTIMONY OF HENRY J. BARCELOUX, FOR DEFENDANT.

HENRY J. BARCELOUX, after being duly sworn, testified as follows:

Direct Examination.

(Examined by W. T. BELIEU, One of the Attorneys for the Defendant.)

At the time I made this assignment to the Peter Barceloux Company in April, 1926, I had 267 shares, as I remember, of Glenn County Bank stock; also 70 acres of land known as the Ibe Tract, and 70 acres known as the Cartenberg lands. I also had 4 acres lying west of Willows; 4½ acres with a house and barn lying west of Willows, and 7 acres south of Willows. I had 207 shares of the Bank of Orland stock, and 26½ shares of United Bank & Trust Company, and some rights therein. I do not know what the rights amounted to. I had 75 shares of Pacific National Fire Insurance Company stock, and also two shares of the preferred and one share of the common stock of the Finance Corporation. I had 50 shares of Elks Hall Association of Chico.

I also owned some farming implements, and had different judgments, that is: A judgment for $25,000.00 or $21,000.00 against the Sacramento Valley Realty Company; $2,800.00 against Nama Singh; a $1,400.00 judgment against Chanan Singh, and Ostrom owed me $3,500.00. I also had my interest in the Lake County ranch, and I had $2,500.00 in the

(Testimony of Henry J. Barceloux.)

United Trust Company; also 478 acres of land in Colusa County.

Besides my farming operations, I was operating an insurance and real estate business in Willows, which said insurance business was a going concern. It is very hard to attempt to estimate the general revenue derived in the year 1926, but approximately I should say the premiums ran $12,000.00 that year. I figured that the 478 acres of land in Colusa County belonged to me. It came through that [371] suit that I filed. I do not know whether Mr. Freeman filed that suit for me or not. It was originally the piece of land that was brought into that Donohue bankruptcy proceeding, and I think I levied on that land under the judgment I have against the Sacramento Valley Realty Company and got it that way. I think that I got the title to it, to the best of my knowledge. I guess that that land is probably worth $50.00 an acre. I think the Lake County property is worth $125,000.00, and it was encumbered in the amount of $30,000.00 or $28,000.00 at that time, and is the same land that I assigned to Mr. Freeman under a contract conveying my equity.

The Ostrom debt of $3,500.00 is not secured. Mr. Ostrom has been farming rice. I believe that $3,500.00 could have been collected through my operations. The two Hindus I heretofore referred to as having judgments against are rice farmers. They were always trying to farm rice and did farm rice there for a number of years. I think the Cartenberg lands are worth about $4,000.00, and the Ibe land I think about $5,000.00. The 4 acres of

(Testimony of Henry J. Barceloux.)

land I heretofore testified about was worth about $100.00 an acre and was subdivided into town lots, and the 4½ acre piece, including the buildings and all, I guess would be worth about $2,000.00 or $2,500.00 The buildings on that property I think consisted of a house and a barn, or two barns, or what is called a big bunkhouse. The 7-acre tract of land south of Willows is adjoining the canal on the south, and it ought to be worth $100.00 an acre, and I think it was. The 207 shares of the corporate stock of the Bank of Orland I think was worth about $150.00 a share, and the 26½ shares of the United Bank & Trust Company stock, with rights, was probably worth $4,000.00. The 75 shares of the Pacific National stock I valued at what it cost me, $1,500.00. Also, the 2 shares of the Finance Company stock were [372] probably worth what I paid for them—I think $300.00 or $250.00. I think the Elks Hall stock was worth $75.00.

The witness HENRY J. BARCELOUX on cross-examination testified substantially as follows:

In April, 1926, my 267 shares of Glenn County Bank stock was at different places. I borrowed on or hypothecated some of it at the Crocker National Bank, and some at the Peoples Bank, but it was not all hypothecated. 158 shares of it were hypothecated to the Peoples Bank or the United Bank & Trust Company; I think a part with both of them. I do not know how much was hypothecated at the Crocker National Bank, but I think the records will show.

The 70 acres of land I refer to as the Ibe lands

(Testimony of Henry J. Barceloux.)

were sold under the Freeman judgment in accordance with the arrangement I had made with Mr. Freeman. It is true that it was sold under the Freeman judgment, and I think it was worth $4,000.00, but I mean by that that my interest in that land was worth that sum. My interest therein was a two-thirds interest. I later sold a portion of that land to Robinson Brothers for $60.00 an acre, but that portion which was sold was the worst portion of the property; very poor quality. I sold 30 acres out of the 70 for said sum of $60.00 per acre. I got the 4 acres west of Willows and the 4½-acre tract west of Willows both under the judgment against the Sacramento Valley Realty Company, so far as I recollect, and as I remember, I got title to it, but I don't think that it was in my name. I don't think I had a deed to it; simply held a judgment lien on it. Neither of said tracts were within the boundaries of the Glenn-Colusa Irrigation District or the reclamation district.

The 7-acre tract south of Willows is located within the boundaries of both the Irrigation District and the reclamation [373] district. I never paid any assessments against that land in 1926, but I think there were some assessments paid—I won't say as to the year, although I know that it was paid and the land was in Mr. Donohue's and my name. The land I describe as west of Willows is Lot 4 in Block 4, and Lot 4 in Block 12, Villa Lots. The 4-acre tract south of Willows and the 7-acre tract south of Willows—the latter tract being described as Lot 1 in Villa Lot 27, and a portion of Lot 2 in

(Testimony of Henry J. Barceloux.)

Villa Block 23—were held in trust for me by Fred J. Wood as security for the judgment I just referred to. My 207 shares of Bank of Orland stock were all hypothecated. 134 shares of said Bank of Orland stock were up as collateral to the Crocker Bank as security for the $48,700.00 note, which said note was later taken up by my brother, George Barceloux; and 64 shares of the capital stock of the Bank of Orland were up as security to the same bank on a $16,000.00 note; and the remaining 9 shares were delivered by me to Peter Barceloux Company in the month of July, 1926. The 26½ shares of the United Bank & Trust Company, and the 8¼ shares of rights were the same shares that I heretofore testified to as going to Mrs. Gelinas. As I understand it, these rights follow the stock; that is at the time these rights were put out it was somewhat of a unique way of making an indirect assessment against the stockholders. Prior to that time I think I held 35 shares of stock in the United Bank & Trust Company, and got notice that unless I put up some more money, my stock would be reduced to 26 shares and I would get rights to a certain proportion if I did not take the additional stock, so, indirectly, it was an assessment. The 75 shares of Pacific National Fire Insurance Company stock that I heretofore referred to, has gone to the Peter Barceloux Company in the month of July, 1926. The 2 shares of Finance Corporation, and the 50 shares of Elks Hall [374] Association were entered in my schedules in bankruptcy. I had the shares of the Elks Hall stock on April 27, 1926. I cannot tell you when I

(Testimony of Henry J. Barceloux.)

last saw the certificates evidencing those shares. They were in my safe, and I might have seen them as late as the latter part of 1926.

The farming equipment that I heretofore testified about was a tractor that I owed some money on to the Bank of Willows, and in 1926 I got a lot of machinery under the judgment against the Sacramento Valley Realty Company. That was some time in 1926, and in the latter part of that year I assigned that to Mr. Huston, and when I mention Mr. Huston, I mean my attorney, Arthur C. Huston. I do not think I assigned the farming equipment, but the contract, as I remember it, was that the farming equipment was to be sold and it was the cash he was to receive. In the month of October, 1926, in addition to the farming equipment above mentioned, I also assigned all my office equipment to Mr. Huston, and after I made that assignment I do not think I had any property left of any kind.

As to the 470 acres of land in Colusa County that I mentioned heretofore, I got the title thereto through the suits against the Realty Company. That is the judgment that was pending. I know that I had possession. The trustee of Charles L. Donohue, a bankrupt, and Mr. Harrison, as receiver for the Sacramento Valley Realty Company, entered into an agreement in reference to possession of that land. I did not have title thereto, but I held it as an asset under that judgment. The said tract of land was subject to a reclamation and irrigation assessment, which amounted, I think, to $12,-

(Testimony of Henry J. Barceloux.)

000.00, and after 1927 said lands simply went back to the irrigation district.

The Lake County ranch cost my brother and myself $67,000.00, [375] if I remember right, and from memory, I think there was spent something like $7,000.00 or $8,000.00 on an irrigation ditch, and over 250 acres of the ranch was put into alfalfa. Also, there was a big barn built there, and fences were repaired. I tried to sell it—that is, I had it on the market, and we would have sold it at any time we got our price, to wit, $125,000.00, but we did not get an offer at that price. In the years 1923, 1924, 1925 and 1926 I do not think I personally tried to sell it, but there were real estate men who were. I and Mr. Lear took some people from Bishop, California, over to look at the ranch, but not with the idea of selling the property, because these people were only going through the valley and we knew they would not buy.

The 26½ shares of the United Bank & Trust Company stock was, on the 27th day of April, 1926, pledged to the People's Bank.

The defendant rests. [376]

The foregoing is a statement of evidence in the within mentioned suit, under Equity Rule No. 75.

Dated: February 7, 1931.

W. T. BELIEU,
HUSTON, HUSTON & HUSTON,
Attorneys for Defendant.

It is hereby stipulated that the above and foregoing statement of evidence is a correct statement

of the evidence adduced at the trial, and the same may be approved by the Judge without notice.

DEVLIN & DEVLIN & DIEPENBROCK,
GEORGE R. FREEMAN,
H. B. WULFF,
Attorneys for Complainant.

The above and foregoing is a full, true and correct copy of the evidence admitted at the trial of said suit.

Dated: Feb. 12, 1931.

A. F. ST. SURE,
Judge.

[Endorsed]: Filed Feb. 12, 1931. [377]

BOND ON APPEAL.

Premium on This Bond is $1250.00 Per Annum.

KNOW ALL MEN BY THESE PRESENTS, that we, Peter Barceloux Company, a corporation, as principal, and Maryland Casualty Company, a corporation, as sureties, are held and firmly bound unto F. E. Buffum as Trustee in Bankruptcy of Henry Joseph Barceloux, bankrupt, plaintiff hereinafter named, in the full and just sum of one hundred twenty-five thousand dollars, to be paid to the said F. E. Buffum, as such trustee, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of October, in the year of our Lord one thousand nine hundred and thirty.

WHEREAS, lately at a District Court of the United States for the Northern District of California, Northern Division, in a suit depending in said court, between F. E. Buffum, as Trustee in Bankruptcy of Henry Joseph Barceloux, a Bankrupt, Plaintiff, vs. Peter Barceloux Company, a Corporation, Defendant, Equity—No. 263, a judgment was rendered against the said Peter Barceloux Company, a Corporation and the said Peter Barceloux Company, a Corporation, having obtained from said court a citation on appeal to reverse the said judgment in the aforesaid suit, and a citation directed to the said F. E. Buffum, as such plaintiff, citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California,—

Now, the condition of the above obligation is such, that if the said Peter Barceloux Company, a corporation, shall prosecute to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

PETER BARCELOUX COMPANY, a Corporation,

By GEO. A. BARCELOUX,
President.

Attest: CORA P. GELINAS, [Seal]
Secretary.

MARYLAND CASUALTY COMPANY,
[Seal]

By W. G. KELSO, [Seal]
Attorney-in-fact.

Acknowledged before me the day and year first above written.

_____.

"This undertaking shall be deemed and construed to contain the 'express agreement' for summary judgment, and execution thereon, mentioned in Rule #34 of the District Court."

Form of bond and sufficiency of sureties approved.

HAROLD LOUDERBACK,
Judge.

[Endorsed]: Filed Oct. 18, 1930. [378]

State of California,
County of Glenn,—ss.

On this 16th day of October, in the year one thousand nine hundred and thirty, before me, W. T. Belieu, a notary public in and for the county of Glenn, personally appeared Geo. A. Barceloux and Cora P. Gelinas, known to me to be the president and secretary, respectively, of the corporation described in and that executed the within instrument, and also known to me to be the persons who executed it on behalf of the corporation therein named, and they acknowledged to me that such corporation executed the same.

WITNESS my hand and official seal the day and year first above written.

[Seal] W. T. BELIEU,
Notary Public in and for the County of Glenn, State of California.

State of California,
City and County of San Francisco,—ss.

On this 16th day of October, in the year one thousand nine hundred and thirty, before me, Con T. Shea, a notary public in and for the city and county of San Francisco, personally appeared W. G. Kelso, known to me to be the attorney-in-fact of the Maryland Casualty Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year in this certificate first above written.

[Seal] CON T. SHEA,
Notary Public in and for the City and County of San Francisco, State of California. [379]

[Title of Court and Cause.]

STIPULATION RE STATEMENT OF EVIDENCE, ETC.

IT IS HEREBY STIPULATED by and between George R. Freeman, H. B. Wulff, and Devlin, Devlin & Diepenbrock, attorneys for complainant, and W. T. Belieu and Huston, Huston & Huston, attorneys for defendant, that the above-named

defendant may have up to and including the 5th day of January, 1931, within which time to prepare, serve and lodge in the Clerk's office of the above-mentioned court the following statements of evidence:

1. A statement of the evidence introduced at the trial of the above-entitled action in the above-entitled court.

2. A statement of the evidence introduced at the hearing of said matter before the Master.

IT IS FURTHER STIPULATED AND AGREED between the parties hereto that all exhibits introduced at the trial of said cause be transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and that the Clerk of the above-mentioned court have up to and including the 5th day of January, 1931, within which time to file with the Clerk of the Circuit Court of Appeals, Ninth Circuit, sitting at the city of San Francisco, State of California, the transcript of the record [380] in the above-mentioned cause and to docket said cause with the Clerk of the Circuit Court aforesaid.

Dated: October 30th, 1930.

DEVLIN & DEVLIN & DIEPENBROCK,
GEORGE R. FREEMAN,
HORACE B. WULFF,
Attorneys for Complainant.

W. T. BELIEU,
HUSTON, HUSTON & HUSTON,
Attorneys for Defendant.

[Endorsed]: Filed Nov. 3, 1930. [381]

[Title of Court and Cause.]

ORDER TRANSFERRING EXHIBITS AND EXTENDING TIME TO AND INCLUDING JANUARY 5, 1931, TO FILE RECORDS AND DOCKET CAUSE AND ORDER EXTENDING TIME TO LODGE STATEMENTS OF EVIDENCE WITH THE CLERK OF THE UNITED STATES DISTRICT COURT.

The defendant in the above-mentioned cause having on the 6th day of October, 1930, filed a petition appealing said suit to the United States Circuit Court of Appeals for the Ninth Circuit, and which petition was allowed on the 6th day of October, 1930, and the defendant and appeallant having given a bond on appeal and which bond was approved on the 18th day of October, 1930, and the plaintiff and appellee and the defendant and appellant having entered into a stipulation on the 30th day of October, 1930, that all exhibits introduced at the trial of said causes be transmitted to the Clerk of the United States Circuit Court of Appeals, Ninth Circuit, and that the Clerk of the United States District Court above mentioned have up to and including the 5th day of January, 1931, within which time to file with the Clerk of the Circuit Court of Appeals, Ninth Circuit, sitting at the city of San Francisco, State of California, the transcript of the record in the above-mentioned suit and to docket said suit with the Clerk of the Circuit

Court of [382] Appeals, Ninth Circuit, and that the defendant and appellant have up to and including the 5th day of January, 1931, within which time to prepare, serve and lodge in the Clerk's office of said United States District Court the statement of evidence introduced at the trial of said cause in said United States District Court, and the statement of evidence introduced before the Master in said causes,—

NOW, THEREFORE, in conformity to said stipulation,—

IT IS HEREBY ORDERED that all exhibits introduced at the trial of said causes be transmitted by the Clerk of said United States District Court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and said Clerk of said United States District Court is hereby given up to and including the 5th day of January, 1931, within which time to file with the Clerk of the Circuit Court of Appeals, Ninth Circuit, sitting at the City of San Francisco, State of California, the transcript of the record in the above-mentioned cause and to docket said cause with the Clerk of the Circuit Court aforesaid, and the above-named defendant and appellant in said cause above mentioned is given up to and including the 5th day of January, 1931, within which time to prepare, serve and lodge with the Clerk of the United States District Court above mentioned, the statement of the evidence introduced at the trial of said cause in the United States District Court and the statement of evidence introduced before the Master at the hearing of said cause before said Master.

Dated: November 3d, 1930.

HAROLD LOUDERBACK,
Judge.

[Endorsed]: Filed Nov. 3, 1930. [383]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal allowed in the above-entitled cause and to incorporate in such transcript of record

1. Bill of complaint.
2. Answer to bill of complaint.
3. Opinion of court.
4. Interlocutory decree.
5. Order of reference.
6. Master's report.
7. Findings of fact and conclusions of law.
8. Defendant's proposed amendments to Master's Report.
9. Defendant's exceptions and objections to Master's report.
10. Defendant's motions interposed to interlocutory decree and Master's report.
11. Motion of defendant that defendant's exceptions, proposed amendments and proposed findings to Master's report be adopted and sustained. [384]

12. Defendant's motion to vacate and set aside interlocutory decree.
13. Defendant's motion to reopen and rehear suit.
14. Order of Court denying defendant's motions.
15. Order confirming Master's report and final decree.
16. Petition for appeal.
17. Assignment of errors.
18. Order allowing appeal.
19. Bond on appeal.
20. Citation on appeal.
21. Praecipe for transcript of record.
22. Statement of evidence introduced at trial of said cause.
23. Statement of evidence introduced before Master.
24. Admission of service of statements of evidence.
25. Notice of judgment of statements of evidence.
26. Notice of time fixed for the approval of statements of evidence.
27. Notice of filing of praecipe for transcript of record.
28. Stipulation transferring all exhibits to the United States Circuit Court of Appeals for the Ninth Circuit.
29. Order of Court transferring all exhibits to the United States Circuit Court of Appeals for Ninth Circuit.

Said transcript to be prepared as required by law and the rules of the United States Supreme Court and the United States Circuit Court of Appeals in and for the Ninth Circuit and thereafter to be

transmitted to said Circuit Court of Appeals [385] in and for the Ninth Circuit *and thereafter to be transmitted to said Circuit Court of Appeals in and for the Ninth Judicial Circuit of* San Francisco, California, together with the original citation on appeal.

W. T. BELIEU,
HUSTON, HUSTON & HUSTON,
Attorneys for Defendant and Appellant. [386]

[Title of Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL.

State of California,
County of Yolo,—ss.

Gertrude Gable, being first duly sworn, deposes and says:

That affiant at all the times herein mentioned was and now is a citizen of the United States, residing in the city of Woodland, county of Yolo, State of California, over the age of twenty-one years, not a party to nor interested in the above-entitled action, and competent to be a witness upon the hearing of any proceedings therein; that she is, and was at all the times herein mentioned a clerk in the office of Huston, Huston & Huston, attorneys at law; that the said Huston, Huston & Huston are the attorneys for the defendant in the above-entitled action; that at all the times herein mentioned they resided and had and now reside and have their offices at the city of Woodland, county of Yolo, State of California; that Devlin, Devlin & Diepenbrock are the

attorneys of record for the above-named complainant in said action, and that Devlin, Devlin & Diepenbrock the said attorneys at all the times herein mentioned, had and now have their offices in the California Fruit Building, [387] Sacramento, California, that at all the times herein mentioned in each of said two places there is a United States postoffice and between said two places there is a regular daily communication by United States mail that on the 23d day of October, 1930, affiant Gertrude Gable acting for and under the direction of Huston, Huston & Huston, attorneys for said defendant as aforesaid, served a true copy of the annexed praecipe for transcript of record herein on the said Devlin, Devlin & Diepenbrock, the attorneys for the said plaintiff by depositing such copy of said praecipe for transcript of record on said date in the postoffice at the city of Woodland, in the said county of Yolo, State of California, properly enclosed in a sealed envelope, addressed to the said Devlin, Devlin & Diepenbrock, attorneys at law, California Fruit Building, Sacramento, California, said place of office of said Devlin, Devlin & Diepenbrock and prepaid the postage thereon; that Devlin, Devlin & Diepenbrock at all the times herein mentioned did not have any office and did not reside at the city of Woodland, county of Yolo, State of California.

GERTRUDE GABLE.

Subscribed and sworn to before me this 23d day of October, 1930.

[Seal] PERCY NAPTON.

Notary Public in and for the County of Yolo, State of California.

[Endorsed]: Filed Oct. 24, 1930. [388]

[Title of Court and Cause.]

PRAECIPE OF COMPLAINANT FOR PRINTING OF ADDITIONAL PARTS OF RECORD.

To the Clerk of the Above-entitled Court:

Now comes the above-named complainant and hereby designates the following additional portions of the record which he requests to be printed and be made a part of the transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit:

1. Dismissal of the defendant George R. Freeman.
2. Oath of office of H. N. Barton as Auditor and/or Master.
3. Notice of entry of interlocutory decree.
4. Admission of service of notice of entry of interlocutory decree.
5. Complainant's objections and exceptions to Auditor's and/or Master's report.
6. Notice of motion for order overruling objections and exceptions to report of Auditor and/or Master filed by the defendant and the allowance of objections and exceptions to said

report filed by the complainant, *et cetera.* [389]

7. Withdrawal of certain objections and exceptions to draft of audit and/or report of H. N. Barton as Auditor and/or Master.
8. Statement of evidence as confirmed and settled by Court.

Dated, October 29th, 1930.

DEVLIN & DEVLIN & DIEPENBROCK,
GEORGE R. FREEMAN,
HORACE B. WULFF,
Attorneys for Complainant.

Due and personal service hereof by copy admitted this 29th day of October, 1930.

HUSTON, HUSTON & HUSTON,
W. T. BELIEU,
Attorneys for Defendants.

[Endorsed]: Filed Oct. 29, 1930. [390]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 390 pages, numbered from 1 to 390, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of F. E. Buffum, etc., vs. Peter Barceloux Company, No. 263—Equity, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to

and in accordance with the praecipes for transcript on appeal, copies of which are embodied herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Ninety-five and 00/100 ($95.00) Dollars, and that the same has been paid to me by the attorneys for the appellant herein.

Annexed hereto is the original citation on appeal.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, this 4th day of March, A. D. 1931.

[Seal] WALTER B. MALING,
Clerk.

By F. M. Lampert,
Deputy Clerk. [391]

[Title of Court and Cause.]

CITATION ON APPEAL.

To the Above-named Plaintiff, F. E. Buffum, as Trustee in Bankruptcy of Henry Joseph Barceloux, a Bankrupt, and to His Attorneys, Messrs. Devlin, Devlin & Diepenbrock, George R. Freeman, Esq., and H. B. Wulff, Esq.

You and each of you are hereby notified that in the above-entitled suit in equity in the Northern Division of the United States District Court for the Northern District of California, wherein F. E. Buffum, as Trustee in Bankruptcy of Henry Joseph Barceloux, a bankrupt, is complainant, and Peter Barceloux Company, a corporation, is defendant, an

appeal has been allowed the defendant, Peter Barceloux Company, a corporation to the United States Circuit Court of Appeals of the Ninth Circuit sitting at San Francisco, State of California, and you and each of you are hereby cited and admonished to be and appear in said court in the courtroom of the said District Court in the city of Sacramento, State of California, within thirty (30) days after the date of this citation, to show cause if any [392] there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS, the Honorable HAROLD LOUDERBACK, Judge of the United States District Court for the Northern Division and the Northern District of California, this, the 17th day of October, 1930.

HAROLD LOUDERBACK,

Judge of the Northern Division of the United States District Court for the Northern District of California. [393]

[Title of Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL.

State of California,
County of Yolo,—ss.

Gertrude Gable, being first duly sworn, deposes and says:

That affiant at all the times herein mentioned was and is a citizen of the United States, residing in the city of Woodland, county of Yolo, State of California, over the age of twenty-one years, not a party to

nor interested in the above-entitled action; that she is, and was at all the times herein mentioned, a clerk in the office of Huston, Huston & Huston, attorneys at law; that the said Huston, Huston & Huston are the attorneys for the defendant in the above-entitled action; that at all the times herein mentioned they resided and had and now reside and have their offices at the city of Woodland, county of Yolo, State of [394] California; that Devlin & Devlin & Diepenbrock are the attorneys of record for the above-named plaintiff in said action, and that Devlin & Devlin & Diepenbrock, the said attorneys at all the times herein mentioned, had and now have their offices in the California Fruit Building, Sacramento, California; that at all the times herein mentioned in each of said two places there is a United States post-office and between said two places there is a regular daily communication by United States mail; that on the 20th day of October, 1930, affiant Gertrude Gable, acting for and under the direction of Huston, Huston & Huston, attorneys for said defendant as aforesaid, served a true copy of the annexed citation herein on the said Devlin & Devlin & Diepenbrock, the attorneys for the said complainant, by depositing such copy of said citation on said date in the postoffice at the city of Woodland, in the said county of Yolo, State of California, properly enclosed in a sealed envelope, addressed to the said Devlin & Devlin & Diepenbrock, attorneys at law, California Fruit Building, Sacramento, California, said place of office of Devlin & Devlin & Diepenbrock, and prepaid the postage thereon;

that Devlin & Devlin & Diepenbrock at all the times herein mentioned did not have any office and did not reside at the city of Woodland, county of Yolo, State of California.

GERTRUDE GABLE.

Subscribed and sworn to before me this 20th day of October, 1930.

[Seal] PERCY NAPTON,
Notary Public in and for the County of Yolo, State of California.

[Endorsed]: Filed Oct. 21, 1930. [395]

[Endorsed]: No. 6400. United States Circuit Court of Appeals for the Ninth Circuit. Peter Barceloux Company, a Corporation, Appellant, vs. F. E. Buffum, as Trustee in Bankruptcy of Henry Joseph Barceloux, a Bankrupt, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed March 5, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

IN UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

No. 6400

PETER BARCELOUX COMPANY, a Corporation, Appellant,

vs.

F. E. BUFFUM, as Trustee in Bankruptcy of Henry Joseph Barceloux, a Bankrupt, Appellee

ORDER OF SUBMISSION—June 2, 1931

Ordered appeal in each of above causes argued by Mr. A. C. Huston, counsel for the appellant, and by Messrs. Robert T. Devlin and Horace B. Wolff, Counsel for the appellee, and submitted to the Court for consideration and decision, with leave to counsel for the respective parties to file reply briefs in typewritten form in five (5) days.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER VACATING ORDER OF SUBMISSION, ETC.—Oct. 21, 1931

It is ordered that the order of submission of this Court, heretofore entered on June 2, 1931 be, and hereby is vacated and set aside, and that counsel for the respective parties be advised to be present in open Court on Friday, October 23, 1931, at 10:30 o'clock a. m. with a view to setting the cause down for re-argument on the points upon which the Court desires further argument, to be indicated to the parties at that time.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER CONTINUING CAUSE—Oct. 23, 1931

Ordered above cause continued for one week for formal entry of order;

Further ordered further briefs may be filed in typewritten form.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER GRANTING LEAVE TO FILE FURTHER BRIEFS, ETC.—Oct. 30, 1931

Ordered leave granted counsel to file further briefs 30x30x10;

Further ordered if counsel desire the cause will be set down for re-argument.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER OF SUBMISSION ON REARGUMENT—May 17, 1932

Ordered appeal in above cause reargued by Mr. A. C. Huston, counsel for the appellant, and by Messrs. Arthur C. Devlin and Horace B. Wulff, counsel for appellee and submitted to the Court for consideration and decision.

Huston, Huston & Huston, Attorneys-at-law

Arthur C. Huston, Arthur C. Huston, Jr., Robert W. Huston

Offices: Democrat Building, Woodland, California; Farmers & Mechanics Building, Sacramento, California

Woodland, California, August 8th, 1932.

Mr. Paul P. O'Brien, Clerk U. S. Circuit Court of Appeals, San Francisco, California.

In re Peter Barceloux Company vs. Buffum, etc., No. 6400

DEAR SIR: Yours of the 6th received.

I assume that your letter refers to any claim of George Barceloux in or to stock certificates of Peter Barceloux Company in question.

Mr. Barceloux does not claim any right, title or interest in this stock and concedes that the Company is the owner thereof.

If desired by the Court we can file a disclaimer or a release or any other form of instrument the Court may suggest signed by George A. Barceloux.

I am sending a copy of this letter to counsel for plaintiff.
Yours very truly, Huston, Huston & Huston, by Arthur C. Huston.

ACH:G.

[Endorsed:] Filed Aug. 9, 1932. Paul P. O'Brien, Clerk.

Huston, Huston & Huston, Attorneys-at-law

Arthur C. Huston, Arthur C. Huston, Jr., Robert W. Huston

Offices: Democrat Building, Woodland, California; Farmers & Mechanics Building, Sacramento, California

Woodland, California, August 15th, 1932.

Mr. Paul P. O'Brien, Clerk of the United States Circuit Court of Appeals, San Francisco, California.

In re Peter Barceloux Company vs. Buffum, No. 6400

My Dear Mr. O'Brien: Yours of the 13th containing copy of letter from one of the Judges in the above case received. Unfortunately, we did not make our position clear. We did not have the matter of compromise in mind. On pages 16 et seq. of Appellant's Opening Brief on Reargument, the Court will find a discussion of this question, and on page 18 the statement that if the Court should reach the point of trying this case de novo, the defendant can and will file with this Court a full and complete release executed by George A. Barceloux, disclaiming any interest in the stock in question.

The certificate of stock is now in the possession of the Court, having been transmitted with the exhibits introduced at the trial. The certificates being in the custody of the Court we are prepared to file a disclaimer, release, stipulation or any other agreement suggested by the Court, to be executed by either or both, the Peter Barceloux Company or George A. Barceloux whereby the Court may be vested with full power and jurisdiction to dispose of this stock.

As stated in our previous letter, if this does not meet the requirements of the Court, we would be glad to adopt any suggestion it may offer as to what should be done to cover the situation.

The position of the Peter Barceloux Company and George A. Barceloux is that the title to the stock is vested in the Company.

As stated, we are prepared to execute any document that may remove any doubt on this point and to clothe the Court with complete power and jurisdiction with reference to the certificate.

Very truly yours, Huston, Huston & Huston, by Arthur C. Huston.

ACH:C.

[Endorsed:] Filed Aug. 16, 1932. Paul P. O'Brien, Clerk.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DIRECTING FILING OF OPINION AND DISSENTING OPINION AND FILING AND RECORDING OF DECREE—Sept. 8, 1932

By direction of the Court, ordered that the majority opinion and dissenting opinion, this day rendered, be forthwith filed by the clerk and that a decree be filed and recorded in the minutes of this Court in this cause in accordance with the majority opinion filed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division

Before Wilbur and Sawtelle, Circuit Judges, and Neterer, District Judge

OPINION—Filed Sept. 8, 1932

WILBUR, Circuit Judge:

This action was brought by the trustee in bankruptcy to recover property alleged to have been fraudulently transferred by the bankrupt while insolvent and is predicated upon § 70-(e) of the Bankruptcy Act, 11 U. S. C. A.

§ 110-(e), and § 3439 of the California Civil Code, which is as follows:

"§ 3439. Transfers, etc., with intent to defraud creditors. Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

The plaintiff alleges that on February 25, 1927, a voluntary petition in bankruptcy was filed by Henry Joseph Barceloux, who will hereinafter be referred to as "the bankrupt," or as "Henry"; that on February 25, 1928 [sic] he was adjudicated a bankrupt; that on April 27, 1926, while the bankrupt was president and managing director of the Peter Barceloux Company, which will hereinafter be referred to as "the company," he executed and delivered to the company an agreement pledging 2499 shares of the capital stock of the company to the company to secure certain pre-existing indebtedness evidenced by three promissory notes, one for $24,064.48, one for $2,000 and the other for $3,500; that this pledge was made with intent to hinder, delay and defraud the creditors of the bankrupt; that the company knew of the fraudulent intent of the bankrupt and that said shares of stock were reasonably worth the sum of $80,000; that on June 29, 1926, the bankrupt deposited with the company other property as additional security for the indebtedness specified in the original pledge agreement. This property consisted of 75 shares of Pacific National Fire Insurance Company, evidenced by certificate No. 126; 5 shares of capital stock of the Bank of Orland, evidenced by certificate No. 25; 4 shares of capital stock of the Bank of Orland, evidenced by certificate No. 26; 50 shares of Glenn County Garage Company, evidenced by certificate No. 53; and 50 shares of Glenn County Garage Company, evidenced by certificate No. 10; that the reasonable value of all such shares was $2,100. It is alleged that this transaction was also had with intent to defraud the bankrupt's creditors and was made when the security already held by the company was of a value of over twice the total amount of said indebtedness; it is also alleged that on August 16, 1926, the company pur-

ported to hold a sale of all the securities pledged as aforesaid for the indebtedness stated in the pledge which aggregated $29,564.48, with interest, and also for certain additional indebtedness, as follows:

$1,000 claimed to have been due from the bankrupt to the company from and after January 3, 1923, with interest in the sum of $276.69; $1,717.62 claimed to be due from the bankrupt to the company within two years prior to August 4, 1926, with interest thereon amounting to $304.18; the sum of $1,800 claimed to be due the defendant within two years prior to August 4, 1926, with interest in the sum of $830.00, a total of $5,928.49; that of this amount the sum of $1,800, with interest of $830, was not an obligation accruing to the company nor owing to it nor secured by said pledges; that the stock was sold upon the pledgee's sale for $36,314.41, of which $35,814.41 was principal and interest, and $500 attorney's fees; that the sale was made at a pretended public sale without the demand for the payment of said indebtedness, without any notice thereof, without bidders being present at the sale, and the price realized was grossly inadequate and the sale was improvident; that the company failed and refused to adjourn the sale, "all of which was done with intent to delay and defraud the nonkindred creditors of Henry Joseph Barceloux." It is alleged that all the transactions were done and had with the intention of defrauding the nonkindred creditors of the bankrupt, and that at the time the bankrupt was in failing financial circumstances contemplating filing a voluntary petition in bankruptcy; that the value of the bankrupt's property in his hands at the time of the bankruptcy was only $300, and the liabilities exclusive of the cost of administration, are in excess of $100,000. It is alleged that after the pledgee's sale the company purported to sell to George A. Barceloux, a brother of the bankrupt, all the securities purchased by it at the pledgee's sale, "and that said George A. Barceloux has at all times thereafter, and still does, purport to hold and possess said securities as owners thereof." It is alleged that the administrator, George R. Freeman, who was afterwards dismissed from the case, claimed that 2499 shares of the capital stock of the Peter Barceloux Company were transferred to him as administrator.

"by way of security for the payment of a considerable sum of money, then and now due to him as such administrator

by said Henry Joseph Barceloux; that an accounting is necessary to ascertain what, if any, moneys were at the time of said sale due to defendant Peter Barceloux Company by said Henry Joseph Barceloux and secured by said pledges, or either of them; than an accounting is necessary to ascertain what moneys, if any, were, at the time of said sale, and now are due or owing to said George R. Freeman upon the security of said transfer and assignment; * * * that an inquiry is necessary to ascertain the respective rights of all parties thereto; that it is necessary that the equities of all parties hereto be adjusted in one action; and that complainant is entitled to recover from defendant Peter Barceloux Company, the excess, if any, over and above the amount, if any, found to be due and owing to said George R. Freeman upon the security of said transfer and assignment at the time of said sale and still remaining due and owing, and the value of all of said shares of stock at the time of said sale."

Plaintiff also alleged:

"* * * that none of said shares of stock are quoted on any stock exchange and that plaintiff has no means of ascertaining the actual value of such shares other than by an inquiry as to the valuation of the assets and liabilities of the respective corporation issuing the same, and that without the aid of this court * * * [said corporations] will refuse to allow any such inquiry and valuation."

The plaintiff prayed that an accounting be had as to the moneys due from the bankrupt to defendant George R. Freeman secured by said 2499 shares of stock; that an inquiry and decree be had as to the valuations of all of said stocks on August 16, 1926; that the pledges of April 27, 1926, and June 29, 1926, and the sale thereunder, be decreed fraudulent and void, and that the plaintiff have judgment against the company for the value of all of said shares of stock at the time of sale

"less such sum, if any, as may be found to be due or owing to George R. Freeman, upon the security of said transfer and assignment and still remaining due and owing; * * * that an inquiry and decree be had and made as to respective rights and equities of the parties hereto * * * and for general relief."

The company answered the complaint, and among other things, denied "that all the stock of the said Henry Joseph Barceloux is now claimed by this defendant to be owned by George A. Barceloux. It alleged that the company had held the 2499 shares of its stock as security for the payment of obligations due it and to be due to it from the bankrupt for several years prior to April 27, 1926, and that the pledge agreement executed April 27, 1926, was not executed to it willingly or voluntarily by the bankrupt but upon the insistent demand of the company and without any intent on the part of the bankrupt to defraud his creditors; that at the time of the transfer he was not insolvent and denied that at the time of the transfer the stock was of the value of more than $36,314.41, the amount for which it was sold at the pledgee's sale. The company admits that the additional property pledged to it on June 29, 1926, was so pledged but that said shares were pledged not only for the indebtedness covered by the pledge of the 2499 shares of stock but also for other indebtedness due from the bankrupt to the company, and denies that this agreement was made with the intention of defrauding creditors and denies that the additional property pledged was worth $2100; defendant alleges that the pledgee's sale was conducted in accordance with law and admits that defendant George R. Freeman, as administrator, claims that the stock in the Peter Barceloux Company was assigned to him as security for a considerable sum of money alleged to be due him as administrator by the bankrupt, but alleges that this transfer to defendant Freeman by way of pledge "was long after the execution and delivery of the pledge agreement of such securities to the company" and denies that an accounting is necessary and denies that there is no means of ascertaining the value of the shares of the corporate stock involved in the controversy. It denies that defendant Freeman has any interest in the stock, and prays that the title of the company to securities held by it be declared to be good and valid. This answer was filed April 30, 1928. March 11, 1929, the plaintiff dismissed the action as to George R. Freeman, administrator.

The case was tried as an equity case without the intervention of a jury and the trial Court found as a fact that the transactions complained of were fraudulent as to creditors, having been made with the intent to hinder, delay and

defraud creditors, as alleged in the complaint. By an interlocutory decree, a master was appointed and directed to ascertain the value of the stock, such valuation to be fixed at its highest value between the date of the pledgee's sale and the date of the commencement of the action. In pursuance of this order the master took evidence and reported that the value of the stock ascertained in accordance with the interlocutory decree was $106,409.44. Exceptions to this report were overruled, the report was confirmed and the Court entered a decree adjudging the trustee in bankruptcy entitled to recover the full amount of $106,409.44 from the company. The decree also provided that the indebtedness due from the bankrupt to the company purporting to be secured by the pledge of the shares of stock, as aforesaid, be subordinated to the claims of all other creditors. It may be noted in passing that it was stipulated on appeal that this portion of the order subordinating the claims of the company to those of other creditors is erroneous and the appellee consents that the decree be modified to this extent. The fraud alleged was that the actual indebtedness owed to the company was less than the amount for which the stock was pledged and sold; that the sale was made without notice, and with intent to defraud creditors; that additional stock in other corporations valued at $2100 was pledged to secure the indebtedness due to the company although the stock in the company already pledged to it was over twice the value of the indebtedness due to it. It appears from the evidence that the bankrupt was a man of large affairs. One of his most valuable assets was his interest in the Peter Barceloux Company, which was a family corporation organized in 1912 by Peter Barceloux, the father of the bankrupt, for the purpose of owning and operating all of his property which he transferred to it for all its corporate stock, which he immediately distributed to his children and descendants of a deceased child. The instrument conveying his properties to the company provided that during his lifetime and the lifetime of his wife, in case she should survive him, all the income derived from such property should be paid to him or his surviving wife. During his lifetime the father managed the property of the company and after his death in December, 1918, the bankrupt, Henry J. Barceloux, became the president and manager of the company. The widow of Peter Barceloux is still living and entitled,

during her life, under the terms of the deed to the entire net income derived from the property belonging to the company. While the complaint counts generally on a transfer to defraud "secured" and "unsecured" "nonkindred" creditors, the only creditor whose claim is specifically alleged in the complaint, is that of the defendant George R. Freeman, administrator of the estate of his father Frank Freeman, upon the balance due upon a judgment in favor of Frank Freeman, amounting to $47,260.31 with interest at 7 per cent, rendered July 25, 1921, by the Superior Court of Glenn County, which was affirmed December 26, 1923, and became final February 24, 1924. This obligation to Frank Freeman arose out of the business of a copartnership composed of Freeman, Henry Barceloux, the bankrupt, and one Donahoe. Freeman sued his copartners for an accounting and settlement of the partnership affairs and was awarded a joint judgment against his partners for $47,260.31 with interest at 7 per cent. Both Henry Barceloux and Freeman were desirous that Donahoe pay his portion of the judgment, and with that end in view cooperated to collect as much of the judgment as possible from Donahoe. Freeman insisted upon payments on the judgment by Henry Barceloux as a condition of delaying execution on the judgment and about $6000 was paid thereon by Henry. This effort, although continued for some time was rather unfruitful, Donahoe having been declared a bankrupt in 1924. Freeman, in accordance with his agreement with Henry Barceloux to cooperate with him, did not issue an execution on the judgment. Frank Freeman died and thereafter the administrator of his estate demanded security from Henry Barceloux as a condition to further delaying the collection of the judgment. In pursuance of this demand, Henry executed an assignment pledging his stock (2494 shares) in the Peter Barceloux Company to Freeman as security for the balance due on the judgment and in addition to that executed a deed of trust on certain real property, being an undivided one-half interest in about 5200 acres of land in Lake County, subject to a mortgage for $30,000, and other properties as additional security therefor as shown by the schedules attached to the bankrupt's petition in bankruptcy. Henry Barceloux at that time informed Freeman that he owed the Peter Barceloux Company some $24,000 for advances made to him and that this claim was a prior

obligation against his stock. Freeman also knew that there was other indebtedness due to the company and secured by the assignments. The pledge agreement to Freeman recited that it was subject to a prior pledge to the company. As was said by the Supreme Court of Oklahoma (Smith-McCord Dry Goods Co. v. John B. Farwell, 6 Okl. 318; 50 Pac. 149), in dealing with the similar rights of chattel mortgagees of a stock of goods, "A creditor who accepts a second mortgage which expressly recites that it is subject to a prior mortgage is estopped from attacking its validity or from asserting that it was made to defraud creditors." Citing Bank v. Brown, 112 Ind. 174; 14 N. E. 358; Renwick v. Bank, 8 Ohio 535; Erwin v. Longworth, 20 Ohio 580. It appears without conflict in the evidence that there was in fact an indebtedness due from Henry Barceloux to the company of at least $24,064.48 at that time. The books of the company show that balance to be due to the company and checks for large amounts were issued by Henry Barceloux as president of the company to himself as payee, and were marked "advances," and paid to his order by the drawee bank long before the pledge of the stock to the company. At the time of the pledge of the stock of the company (2499 shares) to Freeman, the latter was furnished a complete written statement of all the assets of Henry Barceloux. It is not disputed that this statement was correct as to the nature and amount of the assets, although the value of some of these assets was overrated. The administrator examined the question as to the assets of the bankrupt available for the payment of his debts, and after such examination accepted the pledge and trust deed as stated. A part of the amount owed by the bankrupt to the company was for money advanced to Henry to be paid to Freeman on account of his judgment, and thus about $6000 was paid thereon. It can hardly be said that the pledge of the company's stock to the company to secure advances due to it, a part of which was used to pay Freeman, was intended to defraud Freeman, where Freeman was given the benefit of all the equity in the stock by way of a second lien thereon, and also given a trust deed upon valuable real estate in addition thereto. The most that can be said of the transaction is that it was a preference, and a preference per se cannot be fraudulent solely because it is designed to, and does in fact, defer other creditors to the preferred creditor. This sub-

ject was discussed by the Supreme Court of California in Heath v. Wilson, 139 Cal. 366, as follows:

"It is provided in the Civil Code: 'A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another. * * * Nor do the provisions of this title affect the power of a person, although insolvent, and whether residing within or without this state, to transfer property in this state, in good faith, to a particular creditor, for the purpose of paying or securing the whole or a part of a debt owing to such creditor, whether in his own right or otherwise.' §§ 3432, 3451.

The above provisions expressly authorize a conveyance for the purpose of paying or securing certain creditors. The sections are but a declaration of the rule of the common law. It is founded upon the principle that a man may do as he pleases with his own. It is the well-established rule, settled by all the authorities, that the owner of property, even though insolvent, when there is no bankrupt or insolvent law making a different disposition of it, may lawfully transfer it to the payment of any creditor or creditors, to the exclusion of others. It was said by Justice Field in the early case of Dana vs. Stanford, 10 Cal. 278: 'From the very power which a man possesses over his own property, it follows that he can dispose of it in any manner he may see fit which does not contravene the general policy of the law. That policy restricts the power of disposition, so as to prevent the withdrawal of the property from the claims of his creditors. It is not part of such policy to inhibit its application to the payment of one debt rather than another. It would, indeed, be unreasonable to deny, on the one hand, the right to give a preference by voluntary payment or security, and to allow, on the other hand, such preference to be acquired by compulsory process of attachment or execution. A conveyance, giving such preference, is not fraudulent, though the debtor be insolvent, and the creditor be aware, at the time, that it will have the effect of defeating the collection of other debts. To avoid the conveyance, there must be a real design, on the part of the debtor to prevent the application of his property, in whole or in part, to the satisfaction of his debts. A creditor violates no rule of law when he takes payment or security for

his demand, though others are thereby deprived of all means of obtaining satisfaction of their own equally meritorious claims.' And this is the doctrine of all the cases. (Handley v. Pfister, 39 Cal. 283; Lawrence v. Neff, 41 Cal. 569; Priest v. Brown, 100 Cal. 631; Low v. Wortman, 44 N. J. Eq. 202.)"

See also to the same effect, Van Iderstine vs. National Discount Co., 174 Fed. 518, and Richardson vs. Germania Bank of N. Y., 263 Fed. 320. Whether a lawful preference or a lien given with fraudulent intent, clearly Freeman consented thereto and waived any right to complain thereof when he accepted a second lien on the stock. It should also be stated that Henry Barceloux testified that there was a long prior agreement between himself and his father representing the company that his stock in the company was pledged or to be pledged to the company to secure all advances then or subsequently made to him by it, and that as early as 1923 the stock certificate for the 2,499 shares was endorsed in blank and left with or delivered to the officers of the company as such security. The opinion of the trial judge indicates that he was of opinion that this antecedent pledge was void for lack of delivery by the bankrupt to the company because after the delivery of the certificate the latter remained in his custody as president and manager of the company and there was consequently no change of possession. However, the delivery of the certificate endorsed in blank to the company or its officer as a pledge was ipso facto such a change of possession as the law contemplates. (§§ 219, 220, 221, 6 Cal. Jur. pp. 816, 817.) The fact as to this original pledge, made in 1918 or 1923 depends upon the weight to be given to the testimony of Henry. That question might affect other creditors, but as to Freeman was immaterial because he accepted and ratified the later transaction (1926), pledging the stock to the company beliving as he says that there was ample equity to secure his claim.

What we have said so far applies to the pledge to the extent of $24,064.48, and other existing indebtedness. The real complaint of Freeman, as shown by his testimony, is that the pledge to the company was for the additional amount specified, $5,500, i. e., for a note of $3,500 dated February 6, 1923, and a note for $2,000 dated April 27,

1926, and of the pledge of additional stock in other corporations valued at $2,100, and for the inclusion in the sale of other indebtedness which he claims was not bona fide. An examination of the record satisfies us that the claim that such amounts were due the company was made in good faith by the company. The only item seriously challenged by the appellee's evidence is the item of $1,800 plus $830 interest. This amount was money received by the bankrupt as the purchase price of a one-third interest in an estate held by the bankrupt as trustee for Peter Barceloux. The $1,800 was received for the third interest of the father sold in 1917. The amount was acknowledged by Henry as due the company, and the sole point advanced in support of the alleged invalidity of the claim is that the father neglected to make a formal and legally sufficient transfer thereof to the company. The pledge agreement, in so far as the indebtedness due the company other than that specifically named in the pledge agreement is concerned, merely permitted the application of the surplus derived from the sale to such indebtedness. This debt of $1,800 and interest was not due to the company and should not have been charged against the proceeds of the sale, for it was an indebtedness due to the father, Peter Barceloux, and was not transferred to the company. Nevertheless the claim therefor was made in good faith.

So far as the right of the trustee in bankruptcy is predicated upon the right of Freeman to question the pledge to the company it cannot be sustained for he cannot complain of the prior pledge to which he assented.

It remains to consider the rights of the trustee as a representative of other creditors existing at the time of the pledge to the company and sale thereunder. The complaint does not allege the existence of a single creditor other than Freeman at the times involved, nor does the evidence clearly show that any creditors, other than the company and Freeman, were affected by the pledge and sale thereunder. The complaint does allege in general terms that the bankrupt was in "failing financial circumstances and/or insolvent and contemplating the filing of a voluntary petition in bankruptcy"; that at the date of bankruptcy the total assets were $300 and the liabilities in excess of $100,000. Whether any of these creditors were

such at the date of the pledge in June or the sale in August does not affirmatively appear either from the allegations of the complaint or from the proof. It is a fair inference that there were such creditors, but fraud should be distinctly alleged and clearly proved. Freeman testified that he was the only active creditor, and the case was tried with his rights particularly in view. The evidence does not justify a decision in favor of the trustee on appeal based upon the rights of other creditors, nor is the case briefed or argued upon that theory. Concluding then that the pledge of stock to the Peter Barceloux Company was valid, it remains to consider whether the sale thereunder was also valid.

It appears that Freeman desired to avail himself of his lien on the equity in the stock in the company thus pledged to the company for the indebtedness due to it from Henry Barceloux. To that end he asked the company to notify him of any pledgor's sale, and requested that he be given at least ninety days' notice thereof. This request was completely ignored and the sale was made at a time and place not likely to be known by Freeman and without any actual notice to him and with the evident design of cutting off his equity. Such conduct does not appeal to the conscience of the Chancellor, and if consistent with the applicable principles of law the trustee should be relieved from the forfeiture of the equity in the stock so sold. There is a divergence of views among the members of the court as to the consequences which should flow from the manner and method of the sale. In view of the fact that the company has tendered the stock to the clerk of the Court for such disposition as may be made thereof in equity and good conscience, it will be unnecessary to pass upon the question of the validity of the sale, for in any view the decree of the trial Court awarding judgment for the value of the stock cannot be sustained, for reasons that will be presently stated, and a sale of the stock under the decree of the Court in accordance with the rights of the parties will be just under the circumstances.

The decree appealed from awarded judgment for the value of the stock instead of directing the delivery of the stock to the trustee or its sale and the disposition of the proceeds, in accordance with the rights of the parties. At

the time the action was begun the title to all of the stock was in George Barceloux. However, after the complaint had been filed in the case, but before the trial, George Barceloux retransferred to the corporation the stock in the Peter Barceloux Company which he had purchased from the corporation after the pledge sale. That stock was accepted by the corporation and the note given as the purchase price thereof was cancelled. The stock certificate was offered in evidence and deposited with the Court. The testimony showed that it had been transferred to the corporation, and all the other stock sold at the pledgor's sale was also returned to the corporation.

While this action is brought under the provisions of § 70-(e) of the Bankruptcy Act, 11 U. S. C. A. § 110, sub. (e), which provides that "such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value," it has been uniformly held that this provision of the Bankruptcy Act does not give any substantive right in cases of transfer made more than four months before the institution of the bankruptcy proceeding, but merely authorizes the trustee to enforce the rights of creditors in accordance with the laws of the state applicable to the transaction. Davis v. Willey, 263 Fed. 588; affirmed 273 Fed. 397; 8 U. S. C. A. § 566; Scales vs. Halji, 41 Cal. App. 734. The purpose of an equitable action on behalf of creditors under § 3439 Cal. Civ. Code, is to remove the obstacle to the enforcement of the rights of creditors which arises because of the transactions, which, although valid between the parties, are deemed void as to creditors because of the intent to defeat their efforts to subject such property to their claims. As stated by the Supreme Court of California in Sewell vs. Price, 164 Cal. 265, concerning such an action:

"It is really an action for equitable relief against the obstruction caused by a transfer which hinders him in satisfying his claim by the ordinary process of law, that is to say, by an execution."

The question for consideration is whether or not it is proper to enter a judgment for the value of the property transferred where that property is subject to the jurisdiction of the Court. There is no doubt that under these

circumstances, the Court, having determined that the transactions by which the bankrupt was divested of his title were fraudulent as to creditors, could have directed that the stock be subjected to the claims of creditors, and the question is whether it was error instead to render judgment for the value thereof under these circumstances. It was decided by the appellate division of the Supreme Court of New York in Wacy vs. Holbrook, 125 N. Y. S. 1088, that this could not be done, and this decision was affirmed by the Court of Appeals of the State of New York, 206 N. Y. 708, 99 N. E. 1119. The decision is so pertinent that we quote therefrom as follows:

"While it is true the distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished (§ 3339 Code Civ. Proc.), nevertheless we still have in fact the action at law and the suit in equity, and in either case the judgment obtained must be warranted by the facts stated in the complaint and embraced within the issue. § 1207, Code Civ. Proc.; Murtha vs. Curley, 90 N. Y. 372; Harrison vs. Obermeyer & Liebmann Co., 64 App. Div. 499, 72 N. Y. Supp. 270. If, however, the suit be in equity, the Court will adapt its relief to the exigencies of the case; but it will order a sum of money to be paid to the plaintiff or give him a personal judgment therefor only when that species of relief is necessary to prevent a failure of justice or where for any reason it is impracticable to grant the specific relief prayed for. Hubbell vs. Hendrickson, 175 N. Y. 175, 67 N. E. 302; Valentine vs. Richardt, 126 N. Y. 273, 27 N. E. 255.

Here, a personal judgment was not necessary, nor were any facts proved which would justify it. Full and complete relief can be given the plaintiff by directing the appellant to return the certificates of stock in question and requiring him to account for any dividends or benefits derived from them during the time he has held the same.

The awarding of the personal judgment is sought to be sustained upon the ground that the stock has, since it was transferred depreciated in value. In the first place, the evidence does not clearly or satisfactorily establish such fact, and, if it did, not a single fact was proved which tended to show that such depreciation was due to any act of the appellant or that he had done a single thing to im-

pair its value. Where a suit is brought to set aside a transfer of property on the ground that it is fraudulent as to creditors, a personal judgment can only be given against the transferee when it appears that he has done some act which makes it impossible for him to return the property, or else has destroyed or impaired its value. An examination of the authorities cited by the respondent will, it is believed, show that this is the ground upon which a personal judgment in such an action is given.

The foregoing views do not necessarily lead to a reversal of the judgment.

Upon the findings full and complete relief can be given by modifying the judgment, so that it shall direct the appellant to return to the plaintiff certificates representing 740 shares of the stock in question and to account for all dividends received thereon while he has held the same, and as thus modified the judgment is affirmed, without costs to either party in this court. All concur."

The Supreme Court of California in Swinford v. Richards, 23 Cal. 233, had under consideration a decree rendered in a suit in equity brought by a debtor to subject to his claim property fraudulently conveyed. A judgment had been rendered against the fraudulent vendee for the amount of the creditors' judgment. It also directed that the conveyance by the debtor of certain mining ditches be cancelled and that the same be sold and the proceeds applied to the payment of the debt. The appellant objected to the personal judgment against the fraudulent vendees. In that regard the Court said:

"As a general rule, a court of equity declares the fraudulent conveyance void, and directs that the property be sold for the satisfaction of the creditors' debt; but where a fraudulent vendee sells the property, or converts the same to his own use, that kind of relief is rendered impracticable, and he is clearly liable to account for the value thereof, and pay the same to the creditors of the vendor. (Ludlow v. Kidd, 4 Ham. 244; Sparrow v. Chester, 19 Me. 79; Jones v. Henry, 3 Littell 428.)"

This case was followed by the California District Court of Appeal for the third district in Henderson v. D. S. Denehy Merc. Co., 48 Cal. App. 41.

The Supreme Court of the United States had occasion to consider the nature of the remedy to be administered in the creditors' bill in Dumphy v. Kleinschmith, 78 U. S. 610, 11 Wall. 610. Mr. Justice Bradley, speaking for the Court, commented as follows upon the remedies to be administered upon the creditors' bill:

"In an equitable proceeding of this kind, a decree in the nature of a judgment for damages cannot be rendered against the defendant who is alleged to have taken a fraudulent assignment of the property. The decree against him must be a decree for an account. He must be called to account for just what property has come into his hands, and no more; and he will be entitled, under ordinary circumstances, to a rebate for the amount that was justly and honestly his due. The mode of taking such an account is well known in equity proceedings. The defendant is to exhibit an account either in his answer or in the master's office, and if it is not satisfactory to the complainant, it may be surcharged or falsified; and, as the account is finally found to stand, so will the responsibility of the defendant be. But if the complainant wishes to make him answerable in damages, either for the waste of the property or for its disposal by the original proprietor by aid of the wrongful complicity of the defendant, he must sue for damages in an action at law."

The appellee attempts to justify the decree in the case at bar upon two grounds, first, that at the time of the institution of the action, the title to the stock was actually outstanding in George Barceloux, and that the case must be adjudicated with reference to the facts as they existed at the time of the institution of the action; second, upon the ground that the transfer from George back to the company was void under the California law for the alleged reason that the corporation is prohibited from buying its own stock. With reference to the first point it is sufficient to say that the purpose of the action is to secure the aid of the Court to subject certain property to the claims of creditors, which in equity and good conscience belongs to the debtor so far as they are concerned. The plaintiffs, having invoked the power of the Court of equity to assist them in subjecting this property to their debts, cannot complain if they are given that to which the law entitled them,

namely, the right to satisfy their claims from the property fraudulently transferred. They are only entitled to judgment for the value of the property in the event and for the reason that the property itself could not be subjected to their claims. The substitution of the value of the property for the property itself is not a right of the plaintiff unless and until it is determined that the property itself cannot be subjected to his claim, in which event a Court of equity will remedy the defect so far as may be done by substituting for the property a judgment for its value.

In this regard it should be noted that the situation is entirely different from that involved in an action brought by an owner of property for its conversion. He can elect to treat the conversion as a transfer of the title and sue for its value, or to recover the property itself by an action in replevin. The party who has unlawfully converted the property cannot complain of either course. The trustee in bankruptcy, acting for the creditors, has no right of election. His right is to have the conveyance declared void as to him and in consequence to have the property subjected to the claims of the creditors he represents.

As to the claim that the transfer of the stock by George to the company was void under California law "for the reason that the corporation is prohibited from buying its own stock, it is sufficient for the purpose of this suit, to say that appellant's contention in this case is predicated upon the alleged invalidity of the pledge of the stock by Henry to the corporation, the invalidity of the pledgee's sale thereunder, and it is clear from the evidence that when George Barceloux purchased the stock from the Company he was thoroughly advised of the whole situation and charged with notice thereof, and that the sale to him was void for the same reason that the pledge to the corporation was void, if it was void, and his act in retransferring the stock to the Peter Barceloux Company was merely a voluntary relinquishment of the right which he could have been compelled to relinquish had he been made a party to the suit. The retransfer of the stock of the corporation to itself by George merely restored the status quo and was in no sense a purchase by the corporation of its stock in violation of the statutory rule. (See Ralston v. Bank of California, 112 Cal. 208.)

Without determining whether or not the pledgor's sale was void for the alleged reason that although the legal formalities of such a sale were complied with, there was an alleged fraudulent intent to delay and hinder creditors, we hold that the pledge was valid and that the appellee at most is entitled to what the appellant concedes, namely, a sale of all the stock pledged under an order of Court and to an application of the proceeds to the claims of the Barceloux Company aggregating $33,184.41 (being $35,814.41, less $1800 plus $830), with interest on the several items of indebtedness above referred to at the legal rate of seven per cent where no rate was agreed upon, otherwise at the agreed rate. If all the stock pledged to the Peter Barceloux Company sells for more than the amount due to that company as herein determined, the surplus shall be paid to the trustee to be applied to the claim of Freeman, as alleged in the complaint or bill, herein, and if there be any surplus over and above the claims of the Peter Barceloux Company and of Freeman, the balance should be applied to the claims of the general creditors.

The decree is reversed and the cause remanded to the trial Court to fix the time, place and terms of the sale of said stock, and to direct the application of the proceeds of the sale in accordance herewith.

Decree reversed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 6400

DISSENTING OPINION—Filed Sept. 8, 1932

SAWTELLE, Circuit Judge, dissenting:

Many of the assignments and specifications have not been prepared in accordance with the rules of this Court. Repeatedly there has been failure to "quote the full substance of the evidence admitted or rejected" to enable one to make an intelligent ruling without having recourse to the transcript and even to the exhibits. While a federal Court would be technically justified in disregarding such faulty assignments and specifications altogether, I have

preferred to waive formal defects and considered all the specifications except one.

On the other hand, the appellee complains that the appellant's Specifications 12 to 17, inclusive, point out alleged errors made by the master that were not before the trial Court, on exceptions appearing in the record. Examination of the transcript, however, will disclose that the subject matter of the six specifications complained of, especially Specification 17, was, in substance at least, covered by the defendant's exceptions to the master's report. All these exceptions were overruled by the lower Court.

I will, therefore, consider all the specifications of error except one (Specification 17a).

The first two assignments deal with the power of a court of equity to rendered a money judgment, in view of the fact that most of the stocks held under the purported pledge were still in the defendant company's possession and could be returned in kind, if the Court so ordered.

It is fundamental law that when a Court of equity once has jurisdiction, it may give legal relief. Equity Rule 23.

That the lower Court had jurisdiction to determine this suit on the equity side is admitted by the appellant. I am not at this time passing on the question of the validity of the jurisdictional claims to equity relief, made in the bill of complaint. Sufficiency of the proof of these allegations—the necessity for the appointment of a master, for example—was not attacked by the defendant during the trial, and obviously cannot be considered on appeal, especially since such sufficiency is not the subject of an assignment of error.

The appellant urges, however, that the relief granted by the Court is beyond the jurisdiction of the latter.

Considering the record as I find it, devoid of seasonable objection as to jurisdictional facts, I cannot support this contention.

Section 70(e) of the National Bankruptcy Act, 11 U. S. C. A. 110e, provides:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless it was a bona fide holder for value prior to the date of the adjudication."

In the present suit, the trustee prayed for an accounting, for the sale to be decreed fraudulent and void, and for the value of the shares of stock on the date of the pledge sale, August 16, 1926, with interest at 7 per cent. The interlocutory decree appointed an "auditor or master to examine the parties under oath, touching all matters contained in this reference," etc., and to ascertain "the highest aggregate value of the property and stocks" between August 16, 1926, and the date of the approval of the audit.

This was a decree within the jurisdiction of a Court of equity, as was the order of confirmation made thereunder. The ascertainment of the values of various stocks on a given day, especially in a case where it is alleged that the corporations represented are hostile and where it is admitted by the defendant that "none of said shares * * * are quoted on any stock exchange," is clearly a task that a master in an equity case could perform better than could a jury in an action at law.

In Balfour et al. v. San Joaquin Valley Bank et al., 156 F. 500, 502-3, the United States Circuit Court for the Northern District of California said:

"To reach a conclusion on the merits, an account will have to be stated between the parties. It would manifestly be impossible for a jury, in the time allotted for the consideration of a case, or at all, for that matter, to arrive at an accurate statement of the debts and credits and strike a balance. Its verdict would be guesswork. The authorities sustain the jurisdiction of equity in cases similar to the one presented by the bill of complaint. The decision in Hanks Dental Association v. Internation-l Tooth Crown Co., 194 U. S. 303, * * * makes the necessity for retaining the case in equity all the more apparent."

In Kinney-Coastal Oil Company et al. v. Kieffer et al., 277 U. S. 488, 507, the Supreme Court said:

"It is a general rule that a court of equity, in a suit of which it has and takes cognizance, may administer complete relief between the parties, even though this involves the determination of legal rights which otherwise would not be within the range of its authority. Camp v. Boyd, 229 U. S. 530, 552; McGowan v. Parish, 237 U. S. 285, 296; United States v. Union Pacific Ry. Co., 160 U. S. 1, 50, et seq."

See also Rice & Adams Corporation v. Lathrop, 278 U. S. 509, 515; People of Porto Rico v. Livingston, 47 F. (2d) 712, 721.

This Court has repeatedly recognized the power of a Court of equity to render a money judgment in cases similar to the one at bar.

The language of Judge Hunt in Brainard v. Cohn, 8 F. (2d) 13, 15, is applicable to the instant case.

"It is true the trustee seeks a money judgment, but he also asks that certain transfers made by the bankrupt in carrying out a conspiracy to defraud creditors may be set aside, and for an accounting with respect to quantities of personal property taken by defendants, and which has been mixed and confused beyond possible identification with the property of defendants, and for an injunction pendente lite against threatened removal or disposition of certain property, part of which belongs to Cohn, but which has been confused with that taken, and for such further relief as he may be entitled to. Relief against such a situation calls for the flexible jurisdiction of equity, to the end that the wrongdoers shall not profit by their wrongs, and that innocent creditors shall not suffer by them."

See, also, In re Wright Motor Co., 299 F. 106, 108, in which Judge Hunt again delivered the opinion.

In the instant case, the trustee asked for an accounting and for the appointment of a master. Though the necessity for an accounting was denied in the defendant's answer, the necessity for the appointment of a master to make an audit was at no time challenged during or after the trial, nor is it the subject of an assignment of error even at this late date.

In the Wright case, supra, Judge Hunt affirmed a money judgment (292 F. 197, 202) rendered in an equity suit.

Specification 3 deals with the asserted lack of evidence to sustain the decree of the Court. In the briefs for the appellant, the lack of evidence complained of relates to the alleged fraud.

There is no need for an extended analysis of the evidence to sustain the lower Court's finding of fraud. The sequence of events from June 29, 1926, the purported date of the issuance of Certificate No. 12, whereby Henry's 2,499 shares were pledged to the appellant, and February 24,

1927, when Henry filed his voluntary petition, clearly discloses a plan to "freeze out" non-kindred creditors from the family corporation's stock and from other of Henry's assets.

I will advert, however, to one significant bit of testimony by George A. Barceloux, president of the company, which appellant's elaborate and ingenious briefs have failed to explain.

"Q. What happened between the 27th day of April, 1926 [the purported date of the pledge agreement], and the 29th day of June, 1926, the purported date of Certificate No. 12 by which the Company acquired Henry's 2,499 shares as pledgee that actuated you to have it [the certificate] issued?

A. Well I had heard that you got a trust agreement for deed of trust recorded on that Lake County Ranch, and got suspicious that if you had that done you had induced Henry to break that escrow agreement I had and record that, or otherwise you could not have that deed of trust on record."

Yet Exhibit 16 shows that the deed of trust was executed on June 30, 1926, and was recorded on July 3, 1926, the latter date being four days later than that of the purported date of Certificate No. 12. Hence, regardless of the date of the pledge agreement, which itself is alleged to have borne a feigned date, Certificate No. 12 must have been antedated—so as to place it before June 30, 1926, the date on which Henry assigned to Freeman his 2,494 shares of the 2,499 that he had theretofore pledged to the company. This inference of antedating is inescapable of we accept George's testimony as to why the certificate was issued.

Finally, there is probably no question that this series of transfers by Henry to his kindred and to his attorney, left him as he said with no "property * * * of any kind." There is ample justification, at any rate, for the conclusion that these transfers tended to hinder, delay and defraud Henry's nonkindred creditors, whose claims including Freeman's are alleged to have aggregated more than $90,000.

But, since these transfers occurred prior to the commencement of the four-month period preceding the filing of the petition in bankruptcy, it is necessary, before they can be successfully attacked by the trustee, that they be shown to have been fraudulent under the state law. In

Stellwagen vs. Clum, 245 U. S. 605, 614, the Supreme Court said:

"This section [70(e) of the Bankruptcy Act] as construed by this court gives the trustee in bankruptcy a right of action to recover property transferred in violation of state law. Security Warehousing Co. vs. Hand, 206 U. S. 415, 425, 426; Knapp vs. Milwaukee Trust Co., 216 U. S. 545, 557.

"And a right of action under this subdivision is not subject to the four months' limitation of other sections (60b, 67e) of the Bankruptcy Act. Under this subdivision if a creditor could have avoided a transfer under a state law, a trustee may do the same."

See also, Dood vs. Raines, 1 F. (2d) 658, 659; and Gross vs. Grossman, 2 F. (2d) 458, 460.

The Civil Code of California provides:

"Section 3439. Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor.

Section 3440. Every transfer of personal property, other than a thing in action * * * is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself. * * *

Section 3442. In all cases arising under * * * the provisions of this title, except as otherwise provided in Section 3440, the question of fraudulent intent is one of fact and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not

made for a valuable consideration; provided, however, that any transfer or encumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent, or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors."

In the language of the California statute, the question of fraud is one of fact and not of law. While some of the evidence was documentary, much of it consisted of testimony, such as that dealing with an oral understanding between the bankrupt and his deceased father or with the question of whether a date was actually written in on the purported day, or similar matters.

In its opinion the lower Court made it clear that it based its conclusions largely upon its estimate of such testimony:

"Moreover, taking into account all the facts and circumstances in evidence, all that makes for credibility of witnesses and weight to be given to evidence, all the indefinable impressions of the trial, the conviction is compelled that the transfers involved were made with intent by all parties to hinder, delay and defeat Henry's creditors."

Such "indefinable impressions of the trial" are indeed the persuasive imponderables of an equity suit involving fraud.

It may be well, furthermore, to point out at this juncture that, on July 3, 1926, the Barceloux Company held securities valued by the master at $94,949.66, as of August 16, 1926, to secure debts amounting to $29,564.48, or more than three times the value of the three notes secured by the pledge.

Yet on that day, Henry gave the company additional security valued by the master at $2,158, as of August 16, 1926. According to Henry's testimony, this additional security was for "the debt I owed them and not having paid any interest to the corporation, but I think there was some amount paid at some time or another as interest."

Incidentally, the foregoing is a sample of the vagueness of much of the testimony given by members of the Barceloux family in connection with important matters.

This Court has repeatedly held that, under such circumstances, it would not be inclined to disturb lightly the findings of the lower court. Jones vs. Jones, 35 F. (2d) 943,

945; John T. Porter Co. et al. vs. Java Cocoanut Oil Co., Ltd., 4 F. (2d) 476, 478, certiorari denied, 268 U. S. 697-698; Ostbern vs. Dean, 18 F. (2d) 1019, 1020; Monson vs. Hibler, 24 F. (2d) 909, 910.

The case of Porter vs. Java Company, supra, presented facts in many respects similar to those at bar. There, too, the date of the execution of a pledge was in controversy, and interested parties testified as to that fact. In discussing this phase of the case, Judge Rudkin said:

"* * * Without going into further detail, we think it is apparent, from what we said, that the question involved was purely one of fact for the consideration of the trial court, and that the findings of that court, based on conflicting testimony taken in open court, will not be disturbed on appeal. Boss vs. United States, C. C. A. 290 F. 167; Taylor vs. Nevada Humboldt Tungsten Mines Co., C. C. A. 295 F. 112."

In Monson vs. Hibler, supra, Judge Gilbert thus stated the rule:

"The judgment of a District Court on the facts will not be disturbed on appeal unless it is clearly against the weight of the evidence, or unless plain and manifest error exists; and this is especially true where both the referee and the District Judge have coincided in their conclusions. (Cases cited.)"

Without further reviewing the evidence as to fraud, therefore, I can say that I see no reason for disturbing the findings of the lower Court in the case at bar. I believe that there was ample evidence of fraud, both within the meaning of the California law and within the spirit of the National Bankruptcy Act.

Specifications 4 and 5 allege that the lower Court had no jurisdiction to render a decree fixing the value of the stocks in excess of that set forth in the bill.

Examination of the bill does not bear out this objection. Paragraph IV alleges that the complainant "is informed and believes, and upon such information and belief alleges" that the 2,499 shares of Barceloux Company stock were "reasonably worth" $80,000. Paragraph V uses similar language with reference to the shares comprising the sec-

ond pledge. But paragraph X specifically avers that "plaintiff has no means of ascertaining the actual value of such shares other than by an inquiry as to the valuation of the assets and liabilities of the respective corporation (s) issuing the same, and without the aid of this Court, defendant Peter Barceloux Company, and the others of said corporations, will refuse to allow any such inquiry and valuation."

Surely under such pleadings a Court of equity will not hold the complainant to an estimate, avowedly a mere approximation, of its adversary's own holdings—the very accuracy of which estimate, indeed, is sought to be tested, both in the allegations and in the prayer of the bill.

Furthermore, general relief is prayed for. The lower Court, having jurisdiction, might grant any relief consistent with the pleadings and the evidence. Lockhart v. Leeds, 195 U. S. 427, 436-437.

Specification 6 adverts to the fact that the Court awarded the complainant the highest value of the property or stocks involved, between the date of their transfer and the date of the decree. The prayer in the bill was "for the value of all said shares of stock at the time of said sale, to-wit, August 16, 1926, less such sum, if any, as may be found to be due or owing to George R. Freeman, as administrator of the Estate of Frank Freeman, deceased, upon the security of said transfer and assignment at the time of said sale and still remaining due or owing, together with interest thereon at the rate of 7 per cent from said 16th day of August, 1926." As the appellee has pointed out, however, the total of the sum prayed for, with interest, would exceed the stock's highest aggregate value as found by the master. Therefore, as between these two methods of fixing the amount due by the defendant, the appellant would not be injured if the latter valuation were to be allowed to stand.

The item of interest is asked for under the authority of Section 3336 of the Civil Code of California:

"The detriment caused by the wrongful conversion of personal property is presumed to be:

First. The value of the property at the time of the conversion, with the interest from that time, or, where the action has been prosecuted with reasonable diligence, the

highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and

Second. A fair compensation for the time and money properly expended in pursuit of the property."

This Court has decided that an appeal from a decree brings up for review only what was decided adversely to the appellant, and not whether the decree, so far as favorable to him, was erroneous.

In the case of Santa Marina Co. vs. Canadian Bank of Commerce, 254 F. 391, 397, Judge Morrow cited numerous cases in support of the proposition that "an appeal brings up for review only that which was decided adversely to the appellant". Certiorari in this case was denied by the Supreme Court, 250 U. S. 643.

Specification 7 deals with the Court's power to render a decree for any value of the stock, in view of the fact that the latter remained in the possession of the defendant, and, inferentially, could be returned in kind. I have already disposed of this objection, by citing Section 70 (e) of the Bankruptcy Act, which gives the trustee the unrestricted election of whether he shall sue for the property or its value.

Specifications 8, 9, 11, 12, 13, 14, 15, 16 and 18 deal chiefly with the methods and the accuracy of the master's valuation of the property. In so far as these objections have not been disposed of in my foregoing holdings they may be considered in a group.

It is conceded that the Barceloux Compay is a family corporation, and that there is reserved to Lumina Barceloux, the aged mother of the bankrupt, "all of the rents, issues and profits and the income from the said real and personal property". This right belongs to Mrs. Barceloux for the remainder of her life. In its opinion, the trial Court stated that Mrs. Barceloux's age was "undisclosed". This is an error. The record clearly shows that she was 87 years old on March 7, 1931.

The master valued this right of Mrs. Barceloux's as representing a liability of the corporation amounting to $7,828.77 on August 16, 1926, and $3,186.77 on September 26, 1929. The master did not disclose how he arrived at this valuation, but his accuracy is only argumentatively

questioned by the appellant, in its attack upon the accuracy of the valuation of the capital stock itself.

The appellant does, however, question the master's authority to make "any such estimate" of Mrs. Barceloux's right at all. Nevertheless, it cannot be gainsaid that the duty to pay her any profits that might be made by the corporation was unquestionably a charge upon the estate of the corporation. Accordingly, in the absence of any affirmative evidence of error, I see no reason for disturbing the master's valuation. See Lumina Barceloux v. Buffum, 51 F. (2d) 82.

The appellant contends that the family corporation has operated at a loss for three years, that lands are the principal assets of the company, and that the lands are producing no revenue. The appellee asserts that the company has no business, no good will, or none of the other factors that go to make up the value of the stocks of a corporation engaged in a business.

For practical purposes, these views are not very far apart, so far as they lead to the determination of the proper method of valuing the stock. As the appellee points out, the elements that the appellant contends should have been considered in fixing the value of the stock, would not have decreased it, and therefore again the appellant is not harmed. The authorities cited in the appellant's opening brief are not in point.

The value of the land was not lessened merely because it was owned by a company instead of by an individual. Even if we accept the appellant's own gloomy view of the corporation's condition, the minimum of the corporate worth is still the difference between its resources and its debts.

As was said by Mr. Justice Field in the case of the Bank of Commerce v. Tennessee, 104 U. S. 493, 495, "the capital stock of a corporation may in a general sense be said to be all the property of the corporation in which the capital is invested".

Unless otherwise provided by the charter or by-laws, the profits and surplus funds of a corporation, whenever they have accrued, are, until separated from the capital by the declaring of a dividend, a part of the stock itself. Bailey v. New York Central and Hudson River Railroad Co., 89 U. S. 604, 637.

As we have seen, the defendant company, in its answer, admittted that none of the stock alleged to have been pledged was quoted on any stock exchange. This is tantamount to admitting that they had no known market value. When the evidence discloses no market value for stock, it is proper to establish its actual value by proof of the assets and liabilities of the company. American Surety Company of New York v. Duvall, 196 Pac. 457, 460 (Arizona), and cases there cited.

The master's valuation of the assets of the corporation was based largely upon conflicting testimony, and, especially since they were accepted by the district judge, should not be lightly set aside by this Court. In re Sternberg, 300 F. 881, 885; In re Utica Pipe Foundry Co., 221 F. 787, 788, 790; Smith et al. v. Carlisle (C. C. A. 5), 228 F. 666, 668; Medsker and Wife v. Bonebrake, Assignee, 108 U. S. 66, 72-73; Tilghman v. Proctor, 125 U. S. 136, 149-150; Roberts v. Southern Surety Co. (C. C. A. 4), 33 F. (2d) 501, 502-3; Coats v. Barton (C. C. A. 8), 25 F. (2d) 813, 815; Munn v. Des Moines National Bank (C. C. A. 8), 18 F. (2d) 269, 271; Smith v. Hovland (C. C. A. 9), 11 F. (2d) 9, 13, certiorari denied, 271 U. S. 686; Commercial National Bank v. Stockyards Loan Company (C. C. A. 8), 16 F. (2d) 911, 913, and numerous cases there cited, certiorari denied, 275 U. S. 547; In re Foley (C. C. A. 9), 6 F. (2d) 126, 127; Carstens v. McLean (C. C. A. 9), 7 F. (2d) 322, 323; Wingert v. President, etc. of Hagerstown Bank et al. (C. C. A. 4), 41 F. (2d) 660, 661, 663.

Accordingly, I find no reversible error in the master's valuation of the assets and the liabilities of the Barceloux Company, from which valuation the master arrived at his figures for the shares of stock in controversy herein.

Specification 10 relates to the relegation of the defendant company's claims to those of all other creditors. This part of the decree cannot be sustained, however, for such postponement has been, as we have seen, specifically waived by the appellee.

Specification 17 attacks the admissibility of several pieces of testimony offered before the master by the complainant-appellee and ruled upon by the Court:

(a) The opinion of the witness Graves as to the market value of property. Here we have a flagrant instance of the insufficiency of some of the appellant's assignments and

specifications of error. This one sets forth neither the property referred to nor the witness's answer. Reference to the transcript does not enable me to supply this deficiency, and accordingly we cannot consider this subdivision of Specification 17.

(b) This relates to a change in "market value." Here, again, the specification fails to designate what property is referred to, but an examination of the testimony of Graves leads us to believe that the "home ranch" is probably meant. As we have seen, admission of such testimony would not be prejudicial, in view of the fact that the value of the stocks on August 16, 1926, with interest at 7 per cent, would exceed the highest aggregate value.

(c) This objection deals with the qualifications of the witness Eibe and the manner of framing the questions to him. In view of the facts that the witness, as county assessor, seemed well qualified to testify as to land values, and that the master is allowed considerable latitude in taking evidence, I find no reversible error in the admission of this testimony. Blease vs. Garlington, 92 U. S. 1, 7-8; Kansas Loan & Trust Co. vs. Electric Ry. etc. Co., et al., 108 F. 702, 704; In re Automatic Musical Co., 204 F. 334, 335-336, and cases there cited; Chadeloid Chemical Company vs. Chicago Wood Finishing Co., 173 F. 797; Tucker vs. Peiler, 297 F. 570, 574.

(d) This objection relates to the master's admission of testimony as to a sale to prove the value of bank stock. In view of the master's latitude, and, further, because the value of this stock was relevant to the larger question of the value of Barceloux Company stock, this specification does not point out reversible error.

The remaining assignments, 19 to 24, inclusive, are directed against the admission by the lower Court, over the appellant's objections, of evidence, both oral and documentary. I have considered each of these assignments and specifications, carefully and separately, and am of the opinion that whatever errors, if any, which the lower Court may have made in admitting such evidence, were not prejudicial.

It would seem to serve no useful purpose to discuss these specifications in detail, in this dissent, especially in view of

the fact that it already is of undue length. Such length is justifiable, if at all, on the ground that the transactions were of so intricate and complicated a character and involved charges of fraud as well as valuations and accounting relating to property alleged to be worth more than $100,000.

The earlier retention of the pledged securities—if they were indeed pledged—on the part of Henry Barceloux, and the series of transfers to relatives, by which he methodically advanced himself nearer and nearer to the shoals of bankruptcy, are susceptible of but one interpretation: the family, including Henry himself, was carrying out an elaborate plan to hinder, delay and defraud his nonkindred creditors.

Accordingly, I believe that we should affirm that part of the judgment of the lower Court which awards the plaintiff-appellee $106,409.44, together with $173.15 in costs and master's fees. We should reverse that part of the judgment that relates to the postponement of the company's claims until all other claims have been paid, and hold that the Barceloux Company is entitled to participate in the distribution of the bankrupt's assets on a basis equal to that of other creditors of its class. We should also reverse that portion of the judgment sustaining the plaintiff-appellee's objections and exceptions to the master's audit and report, in so far as it revises the master's valuations of the stocks of the Glenn County Bank and the Bank of Orland. The master's valuations of these stocks should be sustained.

[File endorsement omitted.]

In United States Circuit Court of Appeals for the Ninth Circuit

No. 6400

Peter Barceloux Company, a Corporation, Appellant,

vs.

F. E. Buffum, as Trustee in Bankruptcy of Henry Joseph Barceloux, a Bankrupt, Appellee

Appeal from the District Court of the United States for the Northern District of California, Northern Division

Decree—Filed Sept. 8, 1932

This cause came on to be heard on the transcript of the Record from the District Court of the United States for the Northern District of California, Northern Division, and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed with costs in favor of the appellant and against the appellee, and that this cause be, and hereby is remanded to the trial Court to fix the time, place and terms of the sale of the pledged stock, and to direct the application of the proceeds of the sale to the claims of the Barceloux Company aggregating $31,026.41, with interest on the several items of indebtedness above referred to at the legal rate of seven per cent where no rate was agreed upon, otherwise at the agreed rate. If all the stock pledged to the Peter Barceloux Company sells for more than the amount due to that Company as herein determined, the surplus shall be paid to the trustee to be applied to the claim of Freeman, as alleged in the complaint or bill herein, and if there be any surplus over and above the claims of the Peter Barceloux Company and of Freeman, the balance should be applied to the claims of the general creditors.

It is further ordered, adjudged and decreed by this Court, that the appellant recover against the appellee for its costs herein expended, and have execution therefor.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DIRECTING FILING OF OPINION ON PETITION FOR REHEARING AND DIRECTING MODIFICATION OF DECREE, ETC.—Nov. 21, 1932

By direction of the Court, ordered that the typewritten opinion this day rendered by this Court in above cause on petition for rehearing be forthwith filed by the clerk, and that in accordance therewith the petition of appellee for a rehearing be, and hereby is denied.

It is further ordered that the decree of this Court, filed and entered on September 8, 1932, be, and hereby is modified to provide that the credit of $33,184.41 due the Peter Barceloux Company be reduced by partial payment as of the date of the sale, to wit, August 16, 1926, by $2,158.00.

IN UNITED STATES CIRCUIT COURT OF APPEALS

Before Wilbur and Sawtelle, Circuit Judges, and Neterer, District Judge

OPINION—Filed Nov. 21, 1932

WILBUR, Circuit Judge:

Appellee's petition for rehearing calls attention to the fact that the order of the Court heretofore made ignores the situation arising from the fact that stock other than that of Peter Barceloux Company was pledged for the indebtedness due that company. This stock is alleged by the appellee in his complaint to be of the value of $2,100 at the time of the pledgee's sale, August 16, 1926. The master found the value of this stock to be $2,158. This amount ($2,158) should be credited upon the indebtedness due the Peter Barceloux Company as of the date of the sale. The order heretofore made is modified to that extent, namely, that the credit of $33,184.41 be reduced by partial payment as of the date of the sale, to-wit, August 16, 2916, by $2,158.

Petition for rehearing denied.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR ORDER STAYING ISSUANCE OF MANDATE IF PETITION FOR REHEARING BE DENIED

Whereas, the above named appellee has this day filed a petition for rehearing of the entire cause, and which petition is now pending, the said appellee now applies to the Court and moves the Court for an order staying the issuance of the mandate herein in the event that the said petition for rehearing be denied, and requests, in said order, that the time be so extended for the period of forty-five (45) days from and after the date of the order denying such petition for rehearing, if the same be denied, so that, within the said time as extended, appellee may prepare and file with the Supreme Court of the United States of America his petition for writ of certiorari in order to have reviewed the judgment or decree of the above entitled Court made herein on September 8, 1932.

Dated October 6th, 1932.

F. E. Buffum, as Trustee, etc., Appellee and Petitioner. Devlin & Devlin & Diepenbrock, Robt. T. Devlin, Wm. H. Devlin, A. I. Diepenbrock, Horace B. Wulff, George R. Freeman, Attorneys for Petitioner.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING ISSUANCE OF MANDATE—Filed Nov. 28, 1932

Upon application of Messrs Devlin, Devlin & Diepenbrock, counsel for the appellee, and good cause therefor appearing, it is ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including January 3, 1933; and in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

Curtis D. Wilbur, United States Circuit Judge.

Dated San Francisco, California, November 28, 1932.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 23, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,261. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 564. F. E. Buffum, as trustee in bankruptcy of Henry Joseph Barceloux, Bankrupt, petitioner, vs. Peter Barceloux Company. Petition for a writ of certiorari and exhibit thereto. Filed December 23, 1932. File No. 37261.

FILED
DEC 23
CHARLES ELMORE

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1932

No. 564

F. E. BUFFUM, as Trustee in Bankruptcy of Henry Joseph Barceloux, Bankrupt,
Petitioner,

vs.

PETER BARCELOUX COMPANY (a corporation),
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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California State Life Building, Sacramento, California,
Solicitors for Petitioner.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1932

No.

F. E. BUFFUM, as Trustee in Bankruptcy of Henry Joseph Barceloux, Bankrupt,
Petitioner,

vs.

PETER BARCELOUX COMPANY (a corporation),
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

SUMMARY STATEMENT OF MATTERS INVOLVED.

This is a suit in equity brought in the District Court of the United States for the Northern District of California, Northern Division, by petitioner herein, Trustee in Bankruptcy, against respondent for the recovery of the value of certain shares of corporate stock alleged to have been transferred by the petitioner's bankrupt, Henry Joseph Barceloux, in fraud of creditors at a time more than four months preceding the adjudication in bankruptcy of said bankrupt (National Bankruptcy Act, Section 70 e; U. S. Code, Title 11, Section 110 e), and for an accounting to ascertain the value of said shares alleged in the bill to have been necessary to such ascertainment (R. 2-14). The answer, admitting the transfer in pledge as alleged, denied that it was fraudulent (R. 17-20), and admitted, as also alleged, that the defendant had foreclosed the pledge by sale and had thereafter sold the shares to one George A. Barceloux (R. 20, 26). George R. Freeman, originally made a co-defendant, was dismissed without prejudice as an unnecessary party before trial but after the answer was filed by the defendant (respondent herein) (R. 29). The case thus standing proceeded to trial on the issues joined by the petitioner (plaintiff below) and respondent (defendant below) as the only parties in the case. The trial was had by the Court and judgment was rendered for the plaintiff (petitioner herein) upon a finding (R. 34) that the transfer of said shares of corporate stock was fraudulent under Section 3439

of the Civil Code of the State of California* and also fraudulent, under Section 3440 of the Civil Code of the State of California,* in that there was no immediate delivery of the stocks by the pledgor to the pledgee, because the bankrupt, as pledgor, delivered to and held the stock certificates himself as president of the pledgee company. The judgment also ordered a reference to an auditor to make an accounting in order to ascertain the value of the shares in question (R. 42), and upon the report of the auditor, confirmed by the Court and found to be true in fact, a final decree was entered for plaintiff in the sum of $106,-409.44 and costs taxed in the sum of $173.15, besides an allowance to the auditor or master (R. 103).

The appeal was taken by the defendant (respondent herein) from said final decree to the United States Circuit Court of Appeals for the Ninth Circuit, where, after argument, and reargument ordered by that Court on its own motion because of diversity of opinion and some doubt expressed, the decree of the trial Court was reversed, with directions for a modified decree to be entered on remand and for proceedings to carry out the modified decree. Said opinion reversing the final decree was upon divided Court, Honorable William H. Sawtelle, Circuit Judge, dissenting with an opinion (R. 483) contending for affirmance of the decree of the lower Court upon fraud as alleged in the complaint and proven and found at trial.

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*Said sections of the Civil Code are set forth in full in the appendix hereto.

Upon reargument, the appellant (respondent herein) offered in briefs and during oral argument to submit or tender the shares in question, released by George A. Barceloux (not a party to the suit) for disposition by a decree to be ordered by the Circuit Court of Appeals. That tender was afterwards put in writing in the form of letters addressed to the Clerk of the Court for information of the Judges, which letters were filed among the papers in the case, and the modification directed gives effect to the tender. No tender was made in the pleadings or otherwise in the trial Court, and its record shows none. In order to provide, if possible, a record of the matter, these letters are incorporated in the record of the proceedings in the Appellate Court (R. 452, 453). The record of the trial Court shows how the defendant (respondent herein) came into possession of the certificate for the shares after it had sold them to George A. Barceloux, its president and a brother of the bankrupt (R. 418-419), and also shows why only a part of the shares were tendered (the others had been again resold to other buyers) (R. 182, 289). The Circuit Court of Appeals on petition for rehearing modified its own judgment to allow for the value of those not tendered as a credit upon the indebtedness of the bankrupt to the defendant (R. 507).

The principal matters or questions involved are as follows:

1. The proper construction of Section 70 e of the National Bankruptcy Act (U. S. Code, Title 11, Section 110 e) as to whether a court of equity in a

suit for value only could give a money decree where it appeared that because of facts subsequent to issue joined the transferred property might have been recovered by the Trustee; and whether the Trustee has any election to recover value when property can be or might have been recovered.

2. Whether a tender not made in the trial Court may be made and entertained in the Circuit Court of Appeals in the first instance, and the decree of the trial Court be reversed or modified in consequence, the circumstances being as set out heretofore in the summary statement.

3. Whether in a suit in equity by a Trustee in Bankruptcy for relief against a fraudulent transfer "arising out of a controversy in bankruptcy" and brought under the National Bankruptcy Act, Section 70 e, rights and priorities among creditors, may be adjusted and proceeds of property be distributed without trenching upon province of a court of bankruptcy.

4. Whether the taking of additional security by one defrauded creditor, which security is recognized as junior to a pledge claimed or held by the fraudulent transferee, estops the defrauded creditor to say that there was fraud in the senior pledge, and whether such fact could operate against the Trustee in Bankruptcy, suing for all the creditors, to set aside and annul the pledge, which under state law was fraudulent as to all parties who were then creditors, of whom there were many.

5. Whether under the law of California, Civil Code Section 309, as it stood at the time in 1926, and the decisions of the Court of last resort of California thereunder, a California corporation which has sold its shares may resume title to said shares and thus reduce its capital, the purchaser being solvent and the resumption of title being merely a voluntary re-transfer.

6. Whether the defendant pledgee by selling the shares to George A. Barceloux (which it had bought in at the pledge sale) thereby repudiated any further obligation as pledgee and thus converted the shares, giving such right of action for value as the Circuit Court of Appeals recognized in its opinion would be sustainable (R. 481).

7. Whether a valid pledge as against creditors of pledgor could be accomplished by a purported delivery of the indorsed certificate evidencing said shares from the pledgor to himself as president of the pledgee corporation, with no other change of possession and followed by a continued possession of said certificate by himself and without any registration at the time on the books of the corporation.

8. Whether the decision of the Circuit Court of Appeals in reversing the trial Court's finding of the fact of fraud, in the pledge based on the trial Court's observation of the defendant's witnesses, whom the trial judge heard and disbelieved, and on the other indefinable impressions received at the trial, departed from the customary principles of appellate review of

decisions of fact, and thereby in matter of law erred in a way probably in conflict with the great weight of authority.

The foregoing questions (which were all seasonably presented on appeal) pervaded and materially affected the decision of the Circuit Court of Appeals, to the prejudice of the petitioner (appellee below), and thereupon the petitioner, as appellee, petitioned the Circuit Court of Appeals for a rehearing and reargument to correct assigned errors in its decision. The petition for rehearing was denied (R. 506).

REASONS FOR GRANTING PETITION FOR WRIT TO CIRCUIT COURT OF APPEALS.

1. The decision of said Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court of the United States' power of supervision, in this:

(a) That said Appellate Court based its decree on evidence introduced and on certificates of stock tendered during the appeal, and which said evidence and tender do not appear in the record of the proceedings before the trial Court, all of which was in direct conflict with the provisions of U. S. Rev. Stats., Section 698 (U. S. Code, Title 28, Section 863), and in conflict with the applicable decisions of this Court respecting the consideration of new matters on appeal, to-wit:

Realty Acceptance Corporation v. Montgomery, 284 U. S. 547, 549;
Blease v. Garlington, 92 U. S. 1, 4;
Roemer v. Simon, 91 U. S. 149, 150.

(b) The decision of the Circuit Court of Appeals in giving directions to the trial Court as a court of equity in a suit "arising out of a controversy in bankruptcy" under Section 70 e of the National Bankruptcy Act to sell the property and "to direct the application of the proceeds of the sale in accordance herewith," namely, to distribute the proceeds in order of priorities adjudged (in fixing the right and priority of one not a party), and the surplus, if any, to general creditors, usurps the power and jurisdiction of a court of bankruptcy and is a decision of a Federal question in a way probably in conflict with applicable decisions of this Court as regards the province and jurisdiction of a court of bankruptcy, to-wit:

Globe Bank & Trust Co. v. Martin, 236 U. S. 288, 295, 302, 304.

2. That the Circuit Court of Appeals has decided important questions of local and general law in a way in conflict with applicable decisions, in this:

(a) That in holding that a defrauded creditor is estopped to assert fraud by a recital in a second pledge taken subsequently to the fraudulent transaction, the suit being not one by the creditor to enforce the junior pledge agreement but one commenced by a Trustee in Bankruptcy representing the defrauded

creditor as an unsecured creditor, together with all the other and general unsecured creditors of said bankrupt.

(b) And in holding contrary to the local statutes which declare that transfers, fraudulent as to any creditor, become void as to all creditors of the transferor (California Civil Code, Section 3439).

(c) That the Circuit Court of Appeals by its decision ignored the decisions of the highest Court of the State of California in holding that the defendant (respondent herein) had title to the stocks obtained by a retransfer from George A. Barceloux, in that a corporation under the laws of the State of California cannot buy in or obtain title to its own stock unless that is necessary to save such corporation a loss, and no such loss was shown by the record herein.

See:

California Civil Code, Section 309 (as it was in 1926), and Section 342 (as it is at present);

Stevens v. Boyes Hot Springs, 113 Cal. App. 479, 482 (in which a hearing in the Supreme Court of California was denied on June 11, 1931, thus making it the latest and ruling decision);

Stewart v. Stewart Hotel Company, 33 Cal. Ap. 167, at 182.

3. That the Circuit Court of Appeals decided an important question of Federal law which has not been

but should be settled by the Supreme Court of the United States, in this:

(a) Whether Section 70 e of the National Bankruptcy Act gives the Trustee in Bankruptcy the right in an action to set aside a fraudulent conveyance to recover, at his option, either property or its value; or can the Trustee only recover value when the property is not at the time of the trial of the case in the possession of the transferee defendant.

(b) Whether a fraudulent transferee who has sold the property transferred prior to the commencement of the suit, can defeat the right of a plaintiff therein to recover value by repurchasing the property (as was attempted in the case at bar) after issue had been joined.

(c) Further, whether the Trustee in Bankruptcy loses the powers vested in him by Section 70 e of the National Bankruptcy Act by the prior conduct of one defrauded creditor when said Trustee represents other creditors as to whom the local law declares the transfer void.

4. That the Circuit Court of Appeals has decided a Federal question in conflict with applicable decisions of the Supreme Court of the United States, in this:

(a) That it held that a valid pledge can be created by the pledgor delivering to himself, as president of the pledgee corporation, the certificates of stock so sought to be pledged, and such decision is in conflict

with the decision of this Court in *Casey v. Cavaroc,* 96 U. S. 467, 486, and the subsequent decisions of this Court approving said case.

The decision at bar is also in conflict with the applicable local statutes and decisions, to-wit:

California Civil Code, Sections 2988, 2933, 3433, 3440;

McFall v. Buckeye etc. Assn., 122 Cal. 468, 470,

and with the decision of the Ninth Circuit on the sufficiency of the delivery of the shares as against creditors of the transferee. See, *Harvey v. Stowe,* 219 Fed. 17, 22, based on said California statutes.

5. That the Circuit Court of Appeals rendered its decision in conflict with the decisions of another Circuit Court of Appeals and with the decisions of the Supreme Court of the State of California on the same matter, in this:

(a) That upon a sale by the pledgee of pledged security, in form valid at law but invalid in equity, the pledge continues to exist, and any subsequent sale of said property to a third party, or any other renouncement of such relationship of pledgee and pledgor, gives rise to a cause of action in favor of the pledgor (or in the case at bar the Trustee in Bankruptcy) for conversion to recover the value of the property so converted at the date of the sale, less the amount of indebtedness found to be secured by such pledge to said pledgee. And the decision of the

Circuit Court of Appeals on this question is a decision of an important question of local law in a way probably in conflict with the applicable local decisions and also applicable decisions of other Circuit Courts of Appeals.

See:

Lowe v. Ozman, 3 Cal. App. 387, 394 (identical facts);

Bell v. Bank of California, 153 Cal. 234, 238;

Henning v. Aiken, 91 Cal. App. 246, 255, 256;

Dibert v. Wernicke, 214 Fed. 673, at 682, 683 (C. C. A. 6th);

Feilbach Co. v. Russell, 233 Fed. 412, 415 (C. C. A. 6th).

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and forward to this Court a full and complete transcript of the record in the proceeding in said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 6400, Peter Barceloux Company, a corporation, Appellant, vs. F. E. Buffum, as Trustee in Bankruptcy of Henry Joseph Barceloux (a Bankrupt), Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and the judgment herein of said Circuit Court of Appeals be reversed by this Court,

and for such further relief as this Court may deem proper.

Dated, Sacramento, California,
December, 1932.

F. E. BUFFUM,
As Trustee in Bankruptcy of Henry Joseph Barceloux, Bankrupt,

By ROBT. T. DEVLIN,
WM. H. DEVLIN,
Solicitors for Petitioner.

ARTHUR C. DEVLIN,
A. I. DIEPENBROCK,
HORACE B. WULFF,
GEORGE R. FREEMAN,
GEORGE F. LONGSDORF,
Of Counsel.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1932

No.

F. E. BUFFUM, as Trustee in Bankruptcy of Henry Joseph Barceloux, Bankrupt,
Petitioner,

vs.

PETER BARCELOUX COMPANY (a corporation),
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURTS BELOW.

The opinion of the United States District Court in and for the Northern District, Northern Division of California, in the above entitled cause is reported in 51 Fed. (2d) at page 80, and the opinion of the Circuit Court of Appeals for the Ninth Circuit, reversing the decree of the trial Court, is reported in 61 Fed. (2d) at page 145.

II.

JURISDICTION.

The date of the final decree in the District Court under review is September 19, 1930 (R. 104), and the date of the decision of the Circuit Court of Appeals to be reviewed is September 8, 1932 (R. 504), rehearing of which was denied November 21, 1932 (R. 507).

The nature of the case is that of a suit in equity to have certain transfers of property decreed fraudulent and is based upon and arises under a law of the United States to assert a right thereby given, to-wit, upon and under National Bankruptcy Act Section 70 e (U. S. Code, tit. 11, Section 110 e) to recover the value of property (shares of stock) alleged to be reasonably worth the sum of $80,000.00 (R. 5) and for an accounting to ascertain the exact value thereof (R. 5, 11, 12). The decree of the trial Court was in favor of this petitioner, plaintiff below, for the sum of $106,409.44, as found to be the value claimed, and for costs (R. 103), which said decree was reversed by the Circuit Court of Appeals on the date above mentioned (R. 504, 507), with an opinion by a divided Court (R. 456, et seq.) holding, among other things, that where the property is subject to the jurisdiction of the Court, it is not proper to give a decree in money (R. 474, 475); and accordingly, the Circuit Court of Appeals, deeming itself to have such jurisdiction over the property (shares), although appellee, petitioner here, disputed that jurisdiction, reversed the decree with directions for sale of the property (shares) in question and for a distribution of the

proceeds (R. 482). The effect of such decision was to deny the right asserted by the bill under Section 70 e hereinbefore cited.

The jurisdiction of the District Court was thus founded upon U. S. Judicial Code Section 24 (1) (a), as read with but not dependent on National Bankruptcy Act Section 23 b (U. S. Code, tit. 11, Section 47 (b)) as amended by Act of February 13, 1925 (43 Stat. 936, 937, 941). The appellate jurisdiction of the Circuit Court of Appeals is founded on U. S. Judicial Code Section 128, as amended by Act of February 13, 1925 (43 Stat. 936, 937) and by Act of May 27, 1926 (44 Stat. 664).

The cases believed to sustain the jurisdiction of this Court are:

Page v. Arkansas Natural Gas Corp., 286 U. S. 269;

Flanders v. Coleman, 250 U. S. 223;

Collett v. Adams, 249 U. S. 545;

Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426;

St. Louis, K. C. & C. R. Co. v. Wabash R. Co., 217 U. S. 247, 251;

Forsyth v. Hammond, 166 U. S. 506, 514.

III.

STATEMENT OF THE CASE.

A statement of the case has already been made in the petition for certiorari (pp. 2-7) under the

heading "Summary Statement of Matters Involved," and to avoid repetition, that statement is hereby adopted and made a part of this brief to the same effect as if fully set out herein. The statement thus referred to may be supplemented by the statement of the nature of the case found in the preceding part II of this brief. In the argument of the respective points made herein, further references to the particular portions of the record will be found.

IV.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

1. The Circuit Court of Appeals erred in denying the right of plaintiff to elect to sue for a recovery of the value of the shares of stock under National Bankruptcy Act, Section 70 e, in a suit in equity, where, as appeared in this suit, defendant (after parting with all title to said shares) after issue joined, had repossessed itself of the certificate for said shares endorsed for transfer; and the Court erred in holding that under these circumstances a decree for recourse to the shares in specie was the only permissible relief, thus misconstruing said Section 70 e and denying the right thereby given to this plaintiff to elect to seek value.

2. The Circuit Court of Appeals erred in entertaining a tender of the 2499 shares of the defendant's stock (being only a part of the shares involved) and in entertaining an offer of a release to be made by George A. Barceloux (not a party to this suit), which

tender and offer of release were made for the first time on appeal, and as made, were contrary to the defenses and claims of full and valid legal title in the defendant made in its answer with a prayer that title be quieted and declared to be good and valid in it. the said action of the Circuit Court of Appeals being the reception of new evidence on appeal contrary to U. S. Code, Title 28, Section 863.

3. The Circuit Court of Appeals erred in assuming a jurisdiction belonging to a court of bankruptcy, in that the decision of said court undertakes to determine priorities and distributive rights in the 2499 shares ordered to be resold under the alleged pledge, in this suit in equity brought under National Bankruptcy Act Section 70 e, the jurisdiction of the bankruptcy court to adjudge priorities being exclusive by virtue of National Bankruptcy Act Sections 2 (7), 47 (a) (2) and 70 (b), (c).

4. The Circuit Court of Appeals erred in holding creditor Freeman estopped to assert fraud in the alleged pledge by reason of his having taken additional junior security, and in holding that plaintiff Trustee, suing for all creditors, was also estopped by reason of Freeman's supposed estoppel and the elimination of all question of fraud thereby.

5. The Circuit Court of Appeals erred in holding that the defendant could, under the law of California, resume title to its own shares by a voluntary retransfer to it after a sale of absolute title, without any evidence in the record to show that such retransfer was made to save itself from loss because of the

insolvency of the purchaser, or his inability to pay the agreed price to the defendant, and without any evidence of any other fact which in law justifies such acquisition of its own shares.

6. The Circuit Court of Appeals erred in assuming to have jurisdiction over the 2499 shares of defendant's stock by reason of the introduction of the cancelled certificate No. 5 (Defendant's Exhibit No. 3, the stock book with certificate attached), which was put in evidence by plaintiff as proof bearing on fraud; and because George A. Barceloux, the transferee of and retransferor to defendant of the said shares, was not a party to this suit and hence would not be bound by the decree in that respect.

7. The Circuit Court of Appeals erred in reversing the decree of the trial Court for the value of the 2499 shares at the time of the purported pledge sale, contrary to its own finding that title to said shares was revested in defendant by the retransfer of the shares to it, disregarding that the sale by it to George A. Barceloux was in law a conversion by the pledgee in repudiation of the pledgor's general property sufficient to sustain the decree as made.

8. The Circuit Court of Appeals erred in law in holding and finding that the purported delivery of the certificates by the pledgor to himself as president of pledgee corporation, himself keeping exclusive possession, constituted a valid pledge as against creditors.

9. The Circuit Court of Appeals erred in law in rejecting the trial Court's findings of fact that there was fraud in the alleged pledges, which findings were

based on oral evidence of witnesses heard and observed by the trial judge, and also based on written evidence consistent with his findings and inconsistent with the Appellate Court's finding that the pledge was in good faith.

V.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

A. The Circuit Court of Appeals erroneously construed Section 70 e of the National Bankruptcy Act in denying Trustee (petitioner) the election to recover value in an action under said section.

B. In a federal equity appeal, no new evidence can be received (U. S. Rev. Stat., Section 698; U. S. Code tit. 28, Section 863).

C. There is no jurisdiction in a federal court of equity in a controversy arising out of bankruptcy to order priorities adjusted, property of bankrupt estate sold, and proceeds distributed, that being the exclusive province of a Court of Bankruptcy.

D. The Trustee is not precluded, in a suit on behalf of all creditors, from asserting that a transfer was fraudulent by the fact that one of the creditors took additional security which recited the existence of the transfer assailed as fraudulent.

E. Under the law of California, a corporation of that State is prohibited from acquiring its own issued shares except under circumstances none of which ap-

pear in this record (California Civil Code, Section 309, in force in 1926).

F. It was error to assume jurisdiction over the 2499 shares of defendant's stock by reason of the mere introduction of certain cancelled certificates in evidence.

G. The sale by the corporation of the stock acquired by it through an invalid pledge sale constituted a conversion, and therefore the money judgment was proper and should have been affirmed.

H. The decision of the Circuit Court of Appeals ignored the trial Court's finding that the pledge of April 27, 1926, was void as to creditors for want of immediate delivery and a continued change of possession as required by Section 3440 of the Civil Code of the State of California.

I. The trial Court's findings of fact should not be reversed on appeal when based upon the testimony of witnesses heard and observed by the trial judge and also based on written evidence consistent with his findings and inconsistent with contrary findings.

A.

THE CIRCUIT COURT OF APPEALS ERRONEOUSLY CONSTRUED SECTION 70 e OF THE NATIONAL BANKRUPTCY ACT IN DENYING TRUSTEE (PETITIONER) THE ELECTION TO RECOVER VALUE IN AN ACTION UNDER SAID SECTION.

National Bankruptcy Act, Section 70 e provides that:

> "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication."

The present suit, having been brought to recover value and not to recover specific property, was an election by the plaintiff Trustee to claim the right given by the above cited statute to sue for the property or its value.

The Circuit Court of Appeals held that the Trustee had no election, but must seek the property unless that relief is made impossible by the fraudulent transferee by its inability to return the same at any time before final decree (R. 474, 475). For this the Court cites no cases involving that section. In denying this right of election, the decision is in direct conflict with the previous decisions of the Ninth Circuit, which expressly declare that such right of election exists, and which were believed to have established such to be the law in that Circuit:

Schainman v. Dean, 24 Fed. (2d) 475, at 476; certiorari denied 278 U. S. 598;

Brainard v. Cohn, 8 Fed. (2d) 13, 15;

Oliver v. Brennan (In re Wright Motor Company), 299 Fed. 106, 108.

These cases are not in any way mentioned or discussed in the majority opinion of the Circuit Court of Appeals in this case, but they are mentioned in

the dissenting opinion of Circuit Judge Sawtelle (R. 487); and he also states in that opinion that Section 70 e of the Bankruptcy Act "gives the Trustee the unrestricted election of whether he shall sue for the property or its value." (R. 497).

Counsel have been unable to discover, after exhaustive search, any decisions in any of the other Circuits which have passed upon this question (except that there are some decisions to be found wherein value decrees were given where property apparently was available, and without any question of the impropriety of such a decree), nor have counsel been able to discover any decisions by this Court indicative of the proper construction of Section 70 e in that regard. It was the contention and is the belief of counsel for petitioner that the purpose of Section 70 e, above cited, was to enable the Trustee, as a liquidating officer for all the creditors, to recover that which is more advantageous to the creditors with the least possible litigation. The construction given in the case at bar gives the advantage, on the other hand, to the alleged fraud feasor. This question, we believe and urge, is one which should be settled by this Court. Petitioner believes and urges that the question thus presented is of grave importance and widespread concern. In view of the absence of precedents upon the question in the decisions of this Court and in the decisions of the other Circuit Courts of Appeals and of the conflict of decisions in this Circuit, Trustees in bankruptcy who may seek to set aside fraudulent transfers will be embarrassed in deciding how to sue.

Trustees in bankruptcy under like circumstances are entitled to have the question definitely decided.

Supplementary to the foregoing argument, it may be said that the Circuit Court of Appeals, in deciding that in any creditor's suit, under or not under Bankruptcy Act Section 70 e, against a fraudulent transferee of property, a money decree could not be entered if at the time of the decree the specific property may be reached and subjected to the creditor's claim, relied upon the decision of this Court rendered in the case of *Dunphy v. Kleinschmidt*, 11 Wall. 610 (R. 479, quoting from the opinion of this Court) and holding that a money decree in such circumstances was improper. This, it is submitted, misapplied the decision and opinion of this Court. The opinion in *Dunphy v. Kleinschmidt* does not, it is believed, fairly admit of that construction; but, on the contrary, it recognizes that a money decree may be had in equity in such a suit under proper circumstances if arrived at according to such procedure as is proper in a court of equity. It is not believed that according to the principles of equity, any precedents can be found for allowing a fraudulent transferee to part with the transferred property and thereafter, by recovering the possession of it subsequent to the commencement of the suit, then require the plaintiff creditor to look exclusively to such property, if it has in the meanwhile depreciated in value. In such a situation, the value at the time of the suit or of the fraud should be the amount awarded, nor would the principles of equity tolerate speculation by a party to the fraud in

the possibility of an appreciated value resulting to his profit.

B.

IN A FEDERAL EQUITY APPEAL, NO NEW EVIDENCE CAN BE RECEIVED (U. S. REV. STAT. SECTION 698; U. S. CODE TIT. 28, SECTION 863).

It is error to receive new evidence in an equity appeal.

Realty Acceptance Corp. v. Montgomery, 284 U. S. 547, 549;

Blease v. Garlington, 92 U. S. 1, 4;

Roemer v. Simon, 91 U. S. 149, 150.

The tender of the 2499 shares of defendant's stock and the offer of a release of all rights by George A. Barceloux (not a party to this suit), amounts in law to new evidence, and thereby departs from the course of judicial proceedings on review in an equity case established by statute, as well as by general principles of review. In the majority opinion of the Circuit Court of Appeals in this case, it is said (R. 473), "that the company has tendered the stock to the clerk of the Court for such disposition as may be made thereof in equity and good conscience." There is nothing in the record to show that any tender whatever was made in the trial Court, and in fact none was made. To the contrary, the answer prays:

> "that the title of the Peter Barceloux Company in and to the securities in this answer herein mentioned, be declared to be good and valid;" (R. 28).

The Circuit Court of Appeals, holding that a tender and offer of release were made, gave directions that the shares be resold under proceedings to be had in the trial Court, and thereby directed such a decree as the trial Court itself could not have made.

See:

Lane v. Pueblo of Santa Rosa, 249 U. S. 110, 114;

Realty Acceptance Corp. v. Montgomery, 284 U. S. 547, 551.

The record does show that the stock book of Peter Barceloux Company was introduced in evidence by the plaintiff (R. 302) and such stock book is Plaintiff's Exhibit No. 3 sent up herewith, in which Certificate No. 5 for 2499 shares issued to Henry Barceloux and thereafter cancelled, and Certificate No. 12 issued in lieu thereof to Peter Barceloux Company, as pledgee, of the same shares, and thereafter cancelled, both appear, attached to said book. No certificates evidencing the ownership of said shares at the time of the trial were put in evidence, and no evidence thereof appears except that shown by certificate stubs contained in said stock book. The record, therefore, does not show any tender into the trial Court, but rebuts it. Moreover, it appears that at the time of final decree in the District Court, a tender of all the shares as pledged would have been impossible because certain bank, garage and insurance shares covered by the alleged pledge had been sold by the defendant and were no longer in its possession or control (R. 180, 182, 189, 190). In denying rehearing the Circuit

Court of Appeals credited the found value of these shares upon the pledge debt (R. 507).

C.

THERE IS NO JURISDICTION IN A FEDERAL COURT OF EQUITY IN A CONTROVERSY ARISING OUT OF BANKRUPTCY TO ADJUST THE PRIORITIES AND DISTRIBUTE THE PROCEEDS OF THE PROPERTY OF THE BANKRUPT ESTATE, THAT BEING THE EXCLUSIVE PROVINCE OF A COURT OF BANKRUPTCY UNDER NATIONAL BANKRUPTCY ACT, SECTIONS 2 (7), 47 (a), (2), AND 70 (b), (c).

The Circuit Court of Appeals in its opinion reverses and remands the cause to the trial Court, "to fix the time, place and terms of the sale of said stock, and to direct the application of the proceeds of the sale in accordance herewith" (R. 483). This has reference to that part of the opinion immediately preceding, in which the Circuit Court of Appeals holds that the stock should be resold under the pledge, subject to,

> "an application of the proceeds to the claims of the Barceloux Company aggregating $33,184.41 * * * If all the stock pledged to the Peter Barceloux Company sells for more than the amount due to that company as herein determined, the surplus shall be paid to the trustee to be applied to the claim of Freeman, as alleged in the complaint or bill, herein, and if there be any surplus over and above the claims of the Peter Barceloux Company and of Freeman, the balance should be applied to the claims of the general creditors" (R. 482, 483).

This direction casts upon the trial court in equity the exclusive duty of the Trustee to collect, sell and reduce to money the property of the estate for which he is Trustee, all of which must be done under direction and approval of the bankruptcy court [Bankruptcy Act, Sections 47 (a) (2) and 70 (b)]. The Trustee must make the conveyance [Bankruptcy Act, Section 70 (c)]. Exclusive jurisdiction is specifically given to the court of bankruptcy by Bankruptcy Act, Section 2 (7).

Freeman was not a party to the suit, having been dismissed therefrom before the trial (R. 29), and thus no claim of his remained involved in this suit.

This Court has decided that how the fruits of the litigation shall be distributed is for the bankruptcy court in which the proceeding is pending to determine.

Globe Bank & Trust Co. v. Martin, 236 U. S. 288, 304.

In *Isaacs v. Hobbs Tie & Timber Company,* 282 U. S. 734 at 738, speaking of the adjustment of the priorities of conflicting claimants asserting liens existing at the time of the commencement of the bankruptcy proceeding, this Court has said:

> "* * * it is solely within the power of a court of bankruptcy to ascertain their validity and amount and to decree the method of their liquidation. * * * The exercise of this function necessarily forbids interference with it by foreclosure proceedings in other courts, which save for the bankruptcy proceeding would be competent to that end. * * *

> The jurisdiction in bankruptcy is made exclusive in the interest of the due administration of the estate and the preservation of the rights of both secured and unsecured creditors. * * *
>
> Indeed, a court of bankruptcy itself is powerless to surrender its control of the administration of the estate."

The directions given by the Circuit Court of Appeals are in conflict with the principle there laid down and with the statute.

D.

THE TRUSTEE IS NOT PRECLUDED, IN A SUIT ON BEHALF OF ALL CREDITORS, FROM ASSERTING THAT A TRANSFER WAS FRAUDULENT BY THE FACT THAT ONE OF THE CREDITORS TOOK ADDITIONAL SECURITY WHICH RECITED THE EXISTENCE OF THE TRANSFER ASSAILED AS FRAUDULENT.

In the case at bar, the Circuit Court of Appeals held that creditor Freeman was estopped to assert fraud in the pledge herein assailed of the Peter Barceloux Company shares, because Freeman had taken additional security reciting the existence of a prior pledge of the same shares to the Peter Barceloux Company itself. The Circuit Court of Appeals held that since the pledge agreement to Freeman, dated June 30, 1926, recited that it was subject to a prior pledge to the Barceloux Company, Freeman is estopped from attacking the validity of the prior pledge or from asserting that it was made to defraud creditors (R. 466), and that since the complaint failed

to allege in clear terms that there were other creditors than Freeman at the time of the alleged fraudulent transaction, and since the proof at the trial failed to show the existence of other creditors, [The opinion infers their existence, R. 472] or that they were defrauded thereby, there was no justification for a decision in favor of the Trustee on appeal based upon the rights of other creditors (R. 472).

The above opinion is erroneous in several particulars, in this:

(a) The Trustee is not precluded from asserting fraud unless all of the creditors, then existing and who might have asserted it, are estopped.

(b) This is not a suit by Freeman through the Trustee to enforce his junior pledge, and in such a suit only would he be estopped by such a recital.

In support of the first reason herein designated as (a), we submit that the Court erred in finding that Freeman was the only creditor upon whom the Trustee petitioner premised his recovery. The bill of complaint alleged that the bankrupt and the transferee consummated the transaction with intent to hinder, delay and defraud all nonkindred creditors (R. 5, 6, 8, 9 and 10), and that there existed at the times in question many unsecured creditors of said bankrupt (see Paragraph VII of the bill of complaint, R. 8). It is not necessary that the bill of complaint set forth the names and the amount due to each of the creditors then existing, as the Circuit Court of Appeals holds, but a general allegation that there were creditors is sufficient. See:

Collier on Bankruptcy, Volume 1, page 1782; *Keller v. Fowler Bros. & Cox,* 148 Tenn. 571; *Dodd v. Raines,* 1 Fed. (2d) 658 at 660; and see *Flanders v. Coleman,* 250 U. S. 223, 229.

The proof supported the pleading in this: that the bankrupt testified that at the time of the transfers he was indebted to twelve unsecured creditors to whom he owed the total sum of $28,537.97, exclusive of the claims of Freeman and the Barceloux Company. His testimony was corroborated (R. 294) by the introduction as exhibits of the verified proofs of claims filed in the bankruptcy proceeding, which showed total unsecured claims in excess of $40,000.00 owing to parties other than Freeman and the Barceloux Company at the time of the various transactions (Plaintiff's Exhibit No. 1, R. 294). The trial Court found that there "were many and represented by plaintiff herein" (R. 34). All creditors then existing were defrauded thereby, as shown by the fact that the bankrupt transferred all of his properties to the respondent herein and members of his family, and when adjudicated he had no properties remaining from which these nonkindred creditors could satisfy their demands (R. 489). Under local law, intent to defeat any creditor renders the transfer void as to all who were then his creditors (see Section 3439, Civil Code of the State of California, and also Section 3440 of said Code).

The decision of the Circuit Court of Appeals deprives the Trustee (an officer of the Court) of the right of representing all creditors granted to him by

Section 70 e of the National Bankruptcy Act and places a construction upon said Section in direct conflict with the controlling decisions of all other Circuit Courts of Appeals and the decision of this Court, rendered since the trial of the case at bar, in *Moore v. Bay,* 284 U. S. 4.

In support of the second ground designated above as (b), we submit:

This is not an action to enforce Freeman's pledge, and the Trustee in Bankruptcy in the case at bar did not represent Freeman as a pledgee or under his said pledge agreement. It is only the rights of the general unsecured creditors that passed to the Trustee under Section 70 e of the National Bankruptcy Act, and therefore the Trustee represented Freeman as to that part of his claim against the bankrupt which remained unsecured, as shown by his proof of debt filed in the bankruptcy proceeding (see Plaintiff's Exhibit No. 1).

Further, the cases upon which the Circuit Court of Appeals relies as the basis for its holding upon estoppel do not warrant the construction given them. They were all suits to foreclose second mortgages which contained recitals that they were such and subject to prior mortgages. Where a party to such a second mortgage seeks relief upon his right as a common creditor independent of his contract of mortgage, the principles therein announced are not applicable.

Old National Bank v. Heckman, 148 Ind. 507;
Jones on Mortgages, Eighth Edition, Volume 2, Section 912, page 256.

E.

UNDER THE LAW OF CALIFORNIA, A CORPORATION OF THAT STATE IS PROHIBITED FROM ACQUIRING ITS OWN ISSUED SHARES EXCEPT UNDER CIRCUMSTANCES NONE OF WHICH APPEAR IN THIS RECORD (CALIFORNIA CIVIL CODE, SECTION 309, IN FORCE IN 1926).

The Circuit Court of Appeals held that the defendant (respondent herein) acquired legal title to the 2499 shares of its own stock by a transfer from George A. Barceloux, who had purchased these shares from it after it had bought them in at the alleged pledge sale (R. 481), and that the retransfer of the stock of the corporation to itself merely restored the *status quo* and was in "no sense a purchase by the corporation of its stock in violation of the statutory rule" (R. 482). The law in the State of California at the time in question and at all times since has forbidden a corporation to repurchase its own stock except under specified conditions, and the transaction shown in this record is not one of them. (See Section 309 of the Civil Code of the State of California prior to 1931; thereafter Section 342 of the Civil Code of the State of California.*)

The Circuit Court of Appeals relies in support of the above holding on *Ralston v. Bank of California,* 112 Cal. 208 (R. 482). The construction thus given is in direct conflict with later and ruling decisions of the State of California. See *Stevens v. Boyes Hot Springs Company,* 113 Cal. App. 479, 482, in which a hearing in the Supreme Court of California was denied on June 11, 1931, and which was thus made

*The above Civil Code sections are set out in full in the appendix.

the ruling decision on California law in this regard. See, also, *Wagg v. Toler,* 80 Cal. App. 501, 510 prior thereto.

In *Stewart v. Stewart Hotel Company,* 33 Cal. App. 167, at 182 (a rehearing was denied by the Supreme Court of California) the highest Courts of California have held that the liability of a stockholder secured by his stock is an asset of the corporation and if the stockholder is solvent and able to pay, the corporation would have no more right to exchange that asset for his stock than to buy the stock outright.

Since the record does not show that George A. Barceloux was insolvent, the corporation's attempt to repurchase said stock was, under local law, both *ultra vires* and *malum prohibitum,* and hence, utterly void and incapable of estoppel. The Appellate Court's direction being based upon the theory that title was reinvested by a transfer which the Courts of California hold void, the appellee's (petitioner herein) only available remedy is a money decree based on value, and the tender elsewhere discussed in this brief is ineffectual.

The conflict between the decision of the Circuit Court of Appeals in the case at bar and the decisions of the Courts of California in this matter, cited above, is such in gravity and importance as to warrant this Court in granting its writ of certiorari, according to the principles announced in *Forsyth v. Hammond,* 166 U. S. 506, 515.

F.

IT WAS ERROR TO ASSUME JURISDICTION OVER THE 2499 SHARES OF DEFENDANT'S STOCK BY REASON OF THE MERE INTRODUCTION OF CERTAIN CANCELLED CERTIFICATES IN EVIDENCE.

The Circuit Court of Appeals in its opinion assumes to have jurisdiction over the 2499 shares of the Peter Barceloux Company's stock covered by the alleged pledge, by reason of the fact that certificates which represented those shares were in evidence in the trial Court and were deposited with the Court (R. 474). Since these certificates were introduced in evidence by plaintiff Trustee (R. 302, Plaintiff's Exhibit No. 3), as a part of his proof of the fraudulent nature of the transfer and since the certificates appear on the face of them to have been cancelled, and since the stock book (R. 302, Plaintiff's Exhibit No. 3) shows other certificates have been issued in lieu thereof and outstanding and which were not introduced in evidence, it thus appears that there is no predicate either for a tender or for jurisdiction over the shares.

G.

THE SALE BY THE CORPORATION OF THE STOCK ACQUIRED AT A PLEDGE SALE HELD INVALID CONSTITUTED A CONVERSION AND THEREFORE THE MONEY JUDGMENT WAS PROPER AND SHOULD HAVE BEEN AFFIRMED FOR THAT REASON.

Since the Circuit Court of Appeals has directed that the shares alleged to have been pledged shall be resold, said Court must be regarded as having held

that the pledge sale was invalid and that the pledge continues to subsist.

The majority opinion states that:

> "There is a divergence of views among the members of the court as to the consequences which should flow from the manner and method of the sale." (R. 473.)

The sum of these transactions, as found by the Circuit Court of Appeals, is that the defendant corporation by reselling the shares to George A. Barceloux which it had bought in at the invalid pledge sale, exercised acts of absolute ownership over all of these shares, and thereby repudiated the pledge, if there was one. This is a conversion under the local and general law. See:

Lowe v. Ozmun, 3 Cal. App. 387, 394 (identical facts);

Bell v. Bank of California, 153 Cal. 234, 238;

Henning v. Akin, 91 Cal. App. 246, 255, 256;

Dibert v. Wernicke, 214 Fed. 672 at 682, 683 (identical facts);

Feilbach Co. v. Russell, 233 Fed. 412, 415 (C. C. A. 6th).

The attempted retransfer of the shares by George Barceloux to the defendant corporation did not cure the conversion or absolve the corporation from liability for the money value of the converted property.

Henning v. Akin, 91 Cal. App. 246, at 255.

The value at that time having been found by the Court below (R. 61), the record thus afforded every-

thing necessary to affirm the judgment instead of reversing it, and it should have been affirmed.

Johnson v. Peoples State Bank, 22 Fed. (2d) 211, at 213.

Furthermore, with respect to certain shares of stock other than the 2499 shares and covered by the same pledge, the defendant corporation, after receiving them back from George A. Barceloux, sold them again to others (R. 182, 189, 190) and never regained possession, and the decision of the Circuit Court of Appeals upon rehearing recognized the binding effect of that sale by allowing a credit equal to the found value at the time of the conversion (R. 507).

H.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IGNORED THE TRIAL COURT'S FINDING THAT THE PLEDGE OF APRIL 27, 1926, WAS VOID AS TO CREDITORS FOR WANT OF IMMEDIATE DELIVERY AND A CONTINUED CHANGE OF POSSESSION AS REQUIRED BY SECTION 3440 OF THE CIVIL CODE OF THE STATE OF CALIFORNIA.

The particular reason assigned by the trial Court for its finding and conclusion in this regard was that Henry J. Barceloux, the debtor, delivered the certificates bearing a blank endorsement and the written pledge agreement to himself, as president of the Peter Barceloux Company, and kept them in that equivocal position until he resigned as president. It was material error for the Circuit Court of Appeals not to pass on this question, and the question itself was material and decisive.

The provisions of Section 3440 of the Civil Code of California are applicable to a pledge of corporate stock, and for such pledge to be valid as against creditors of the pledgor, it must be accompanied by immediate delivery of the certificate and an actual and a continued change of possession thereof.

See:

McFall v. Buckeye etc. Assn., 122 Cal. 468, 470 and

Harvey v. Stowe, 219 Fed. 17, 22, a decision of the Ninth Circuit Court of Appeals based upon California statutes and law.

This Court, in construing like statutes of other states, has also so held.

See:

Casey v. Cavaroc, 96 U. S. 467, 486;

Christian v. Atlantic & N. C. R. R. Co., 133 U. S. 233, 241.

The decision of the Circuit Court of Appeals is in direct conflict with *Casey v. Cavaroc,* 96 U. S. 467, in which case (like the case at bar) the president of the pledgor endeavored to consummate a pledge by the delivery of the securities to himself, as agent of the pledgee, and this Court held that such pledge was invalid as to creditors for the want of a legal delivery.

The decision of the Circuit Court of Appeals thus conflicts not only with the decisions of this Court, but with the statute and the decisions of the Courts of California as announced in *McFall v. Buckeye etc. Assn.,* 122 Cal. 468, and with its own previous deci-

sion based upon California statutes and law in *Harvey v. Stowe,* 219 Fed. 17, 22.

This conflict is such in importance as to fall within the reasons announced by this Court in *Forsyth v. Hammond,* 166 U. S. 506, 515, as affording a sufficient reason for the granting of a writ of certiorari.

I.

THE TRIAL COURT'S FINDINGS OF FACT SHOULD NOT BE REVERSED ON APPEAL WHEN BASED UPON THE TESTIMONY OF WITNESSES HEARD AND OBSERVED BY THE TRIAL JUDGE, AND ALSO BASED ON WRITTEN EVIDENCE CONSISTENT WITH HIS FINDINGS AND INCONSISTENT WITH CONTRARY FINDINGS.

The particular finding referred to is that of the trial Court finding fraud in the pledge with intent to hinder and delay creditors. The trial Court's findings were:

> "Moreover, taking into account all the facts and circumstances in evidence, all that makes for credibility of witnesses and weight to be given to evidence, all the indefinables impressions of the trial, the conviction is compelled that the transfers involved were made with intent by all parties to hinder, delay and defeat Henry's creditors. * * * Their more or less contradictory testimony to their own innocency, fails to persuade to [sic] outweigh all that gives that sinister aspect to their actions which establish their intent not only to acquire Henry's properties, to satisfy their claims, perhaps to protect him also, but also to foil efforts of his unsecured creditors to make their claims out of his properties" (R. 34, 35).

The Ninth Circuit Court of Appeals has repeatedly held that under such circumstances it would not be inclined to disturb lightly the findings of the lower Court.

Jones v. Jones, 35 Fed. (2) 943, 945;
John T. Porter Co., et al. v. Java Cocoanut Oil Co., Ltd., 4 Fed. (2d) 476, 478, certiorari denied, 268 U. S. 697-698;
Ostbern v. Dean, 18 Fed. (2d) 1019, 1020;
Monson v. Hibler, 24 Fed. (2d) 909, 910.

These cases are cited in the dissenting opinion by Circuit Judge Sawtelle (R. 493).

The circumstances under which a Circuit Court of Appeals is warranted in disregarding the findings of the trial Court are set down and explained in Chief Justice Taft's opinion in *Harkin v. Brundage,* 276 U. S. 36, 53, and the Circuit Court of Appeals did not conform thereto.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the proper construction of the National Bankruptcy Act may be had, settled and determined, that conflicts mentioned herein between national and state Courts be settled and removed, that the practice and jurisdiction of the Circuit Courts of Appeals upon appellate review be more clearly defined, and that to such ends, a writ of certiorari should be granted, and this Court should

review the decision of the Circuit Court of Appeals and finally reverse it.

Dated, Sacramento, California,
December, 1932.

Respectfully submitted,
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(Appendix Follows.)

Appendix

California Civil Code, Section 3439:

"Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

California Civil Code, Section 3440, first paragraph:

"Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer."

California Civil Code, Section 309, as it stood in 1926:

"Unless they shall have been first permitted or authorized so to do by the commissioner of corporations, directors of corporations must not make dividends except from the surplus profits arising from the business thereof; nor must they create any debts beyond their subscribed capital stock; *nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock, except as hereinafter provided, nor reduce or increase the capital stock,* except as provided in section three hundred fifty-nine of this code. For a violation of the provisions of this section, the directors under whose administration the same may have happened (except those who may have caused their dissent therefrom to be entered at large on the minutes of the directors at the time, or were not present when the same did happen) are, in their individual or private capacity, jointly and severally liable to the corporation, and to the creditors thereof, to the full amount of the capital stock so divided, withdrawn, paid out, or reduced or debt contracted. Nothing herein prohibits a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution, or the expiration of its term of existence" (italics ours).

California Civil Code, Section 342 (enacted 1931):

"No corporation shall purchase or agree to purchase, or cause or permit any corporation which

it controls to purchase or agree to purchase, or employ or assist any person or corporation to purchase or agree to purchase for its account any of its shares except as follows:

(1) *To collect or compromise in good faith, a debt,* claim or controversy with any shareholder;

(2) *From shareholders who by reason of dissent* are entitled to be paid the fair cash value of their shares;

(3) *From one who as an employee other than as an officer* or director has purchased such shares from the corporation under an agreement reserving to the corporation the option to repurchase or obligating it to repurchase;

(4) *To eliminate fractional shares;*

(5) *To purchase shares subject to redemption* at prices not exceeding the redemption price thereof;

(6) *To carry out provisions of its articles authorizing conversion* of its shares; and

(7) *Subject to limitations, if any, contained in its articles,* only from earned surplus.

A corporation shall not purchase its own shares of any class in any case when there is reasonable ground for believing that the corporation is unable, or, by such purchase, will be rendered unable, to satisfy its debts and liabilities when they fall due. Nothing in this section shall be construed to prevent a corporation from acquiring its own shares by gift or bequest or upon a merger with or distribution of the assets of another corporation (Added by Stats. 1931, p. 1800)."

FILED
FEB 20
CHARLES ELMO

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1932

No. 564

F. E. BUFFUM, as Trustee in Bankruptcy of Henry Joseph Barceloux, Bankrupt,
Petitioner,

vs.

PETER BARCELOUX COMPANY (a corporation),
Respondent.

BRIEF OF PETITIONER AFTER WRIT OF CERTIORARI GRANTED.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1932

No. 564

F. E. BUFFUM, as Trustee in Bankruptcy of Henry Joseph Barceloux, Bankrupt,
Petitioner,

vs.

PETER BARCELOUX COMPANY (a corporation),
Respondent.

BRIEF OF PETITIONER AFTER WRIT OF CERTIORARI GRANTED.

I.

OPINION OF THE COURTS BELOW.

The opinion of the United States District Court in and for the Northern District of California, Northern Division, in the above entitled cause, is reported in 51 Fed. (2d) at page 80, and the majority opinion of the Circuit Court of Appeals for the Ninth Circuit,

reversing the decree of the said District Court with directions, and also the dissenting opinion of Judge Sawtelle, are reported in 61 Fed. (2d) at page 145.

II.

JURISDICTION.

The grounds on which the jurisdiction of this Court rests, and also the grounds on which the jurisdiction of the trial Court and the Circuit Court of Appeals rests, have already been stated in the petition for *certiorari,* at page 15 of the supporting brief of petitioner, and this being believed to be a sufficient compliance with Rule 27 of this Court, the same is not repeated, but is here referred to for all purposes to the same effect as if it were here set out in full.

Supplementing that statement, it may be said that the jurisdiction in equity is founded upon Section 70e of the National Bankruptcy Act, because it is necessary to avoid a fraudulent transfer, made more than four months previous to the adjudication of the transferor as a bankrupt, which is the province of equity jurisdiction.

In view of certain arguments made in the Circuit Court of Appeals, it may be stated that the case was tried as an equity case (R. 462, bottom of page, majority opinion), and as found by Judge Sawtelle in the dissenting opinion (R. 485, *et seq.*), the appellant, respondent here, admitted that the trial Court had jurisdiction to determine this suit on the equity side (R. 484). The answer (R. 14, 28) contains no

defense in matter of law that the case is not one in equity and should be tried at law, and no motion to transfer was made in the trial Court, pursuant to Equity Rule 22, or otherwise.

III.

STATEMENT OF THE CASE.

The case is here on *certiorari* after an appeal to the Circuit Court of Appeals for the Ninth Circuit in equity, from a decree made and entered in the United States District Court for the Northern District of California, Northern Division, in favor of the petitioner, complainant below, and against the respondent, defendant below, the suit being one filed by the petitioner, as trustee in bankruptcy of Henry Joseph Barceloux, a bankrupt, against the respondent, Peter Barceloux Company, a corporation.

George R. Freeman, as administrator of the estate of Frank Freeman, deceased, was originally made a codefendant with the respondent herein; but by his consent and without objection was dismissed (R. 29) and the case proceeded to trial with your petitioner, plaintiff below, and respondent, defendant below, as the only parties in the case. Wherever in this brief George R. Freeman is mentioned, it will be understood that he is spoken of only as administrator of the estate of Frank Freeman.

The decree of the District Court having been entered on September 19, 1930, before New Equity Rule 70½ went into effect, there are no findings of

fact conforming to that rule, but the final decree (R. 101) refers to and adopts as findings of fact and conclusions of law the opinion of the trial Court dated July 25, 1929, and filed July 29, 1929, which appears on R. 30 to 35, inclusive.

On appeal to the Circuit Court of Appeals for the Ninth Circuit, that Court after argument and a reargument ordered on its own motion reversed the decision of the District Court by a majority of a divided Court (R. 456-483), Circuit Judge Sawtelle, dissenting (R. 483-504), and a petition for a rehearing in the Circuit Court of Appeals was denied (R. 507).

Henry Joseph Barceloux was adjudicated a bankrupt on February 25, 1927 (R. 3, 15). This suit was brought on April 3, 1928 (R. 14). The bill of complaint seeks to avoid certain transfers made by the bankrupt to the respondent, Peter Barceloux Company, at a time when the bankrupt was president thereof, to-wit: a certain purported pledge (bearing date, April 27, 1926) of his 2499 shares of the respondent corporation's stock, seeking to secure a preexisting indebtedness, also a subsequent purported pledge of shares of other corporations as additional security for the same indebtedness, and also the bill seeks to avoid the purported pledge sale of all said shares, all of which transactions were alleged to have been made with intent to hinder, delay, and defraud the many non-kindred creditors of said bankrupt then or thereafter existing (R. 2-13, Bill of Complaint).

The bill alleged that the shares, which were purchased by the respondent at its own purported pledge

sale, were later transferred by it to George A. Barceloux. The Trustee sought by his said bill not the return of the property so fraudulently transferred, but its value, based on the right of election given such Trustee under the provisions of Section 70e of the National Bankruptcy Act, and also because such was the only recovery available to him in that the shares had been theretofore transferred to George A. Barceloux, who at the time of the filing of the bill held and possessed the shares as owner.

The respondent, without filing a motion to dismiss or a motion to make the bill more definite and certain, answered said bill, denying the fraud and averring that the transactions were all *bona fide* and for a valuable consideration (R. 18), and further, admitted that the respondent had transferred the shares to George A. Barceloux, but denied by a negative pregnant that "the said George A. Barceloux has at all times thereafter, and still does, purport or claim to hold and possess said securities as owner thereof" (R. 26).

The case was tried upon said issue so made before the said United States District Court, and said Court made and entered its interlocutory decree, finding that all of said transfers were fraudulent and void, as alleged in the bill, and decreeing that the same be avoided, and referred the cause to an auditor and master to determine the highest aggregate value of said properties during the period commencing August 16, 1926 (the date of the purported pledge sale), to and including the date of the filing and approval of the audit and report of said auditor or master (R. 45).

Said master and auditor, after due proceedings had, rendered and filed his audit and report, fixing the highest aggregate value in the sum of $106,409.44, and thereafter a final decree was made and entered pursuant to said interlocutory decree and the master's audit and report (R. 49-61). The said auditor or master found the value of all the said properties at the time of the alleged pledge sale (August 16, 1926) to be the sum of $97,107.66 (R. 61).

The remaining facts necessary to state the case touch upon the issues of fraud and because of their complexity will be stated in a chronological narrative as the best means to insure the utmost possible conciseness.

In the Spring of 1926, Henry Joseph Barceloux (the bankrupt) was a man of large operations in banking, real estate, ranching, etc., and had arrived at the crisis of his affairs. He had extensive properties and likewise large debts. As found by the lower Court, his properties were of a value of $180,000.00, and his debts, which were owing to many creditors, amounted to the sum of $191,000.00 (R. 34). At that time his only substantial unencumbered asset was his shares (2499) in the respondent Peter Barceloux Company (R. 420-426). Said company was a family corporation organized in 1912 by Peter Barceloux, the father of the bankrupt, for the purpose of owning and operating all of his properties, which he transferred to it for all of its corporate stock, which stock was immediately distributed in four equal parts to his two sons, George and Henry Barceloux, his daughter, Cora Gelinas, and three children of a deceased

son (R. 296). The bankrupt was president of the company from its incorporation until he resigned on July 28, 1926, although during the lifetime of Peter Barceloux (who died in 1918), Peter managed said properties (R. 464).

In 1921 one Frank Freeman secured a judgment against Henry Barceloux and one Donohoe, which became final in 1924 (R. 400), and in 1926 there was owing upon said judgment the total sum of $58,000.00. Upon said judgment becoming final in 1924, George Freeman, as administrator of Frank Freeman, deceased, together with the bankrupt and the bankrupt's attorney, entered into an agreement whereby all of said parties were to cooperate to the end that a large portion of said judgment might be satisfied from the estate of Donohoe (R. 371). Donohoe, immediately after the finality of said judgment, was adjudicated a bankrupt (R. 376). Under such agreement the bankrupt promised to refrain from hypothecating, encumbering or transferring any of his properties (R. 371-372), and in consideration thereof George Freeman, as such administrator, was to forbear issuing execution against any of Barceloux's properties (R. 376). In the Spring of 1926 it became apparent that all endeavors against the bankrupt estate of Donohoe would be unsuccessful and that the obligation of satisfying said Freeman's judgment would rest solely upon Henry Barceloux. Thereupon commenced a sequence of events and transfers whereby all of Henry Barceloux's assets (of a value of $180,000.00) were transferred to the respondent family corporation and to other members of Henry's family, and on

February 25, 1927, when Henry filed his voluntary petition in bankruptcy, he, as found by the lower Court (R. 33) and as expressed by Judge Sawtelle (R. 489, dissenting opinion) had "no property left of any kind" to satisfy demands of his many non-kindred creditors, all of which clearly discloses a plan to " 'freeze out' non-kindred creditors from the family corporation's stock" and from the rest of Henry's assets.

These events, stated in sequence and as briefly as possible, were as follows without any dispute or conflict, except as to those herein stated to have been upon the testimony or "claims" of members of the Barceloux family.

1. Because of the demands of Freeman for payment or security upon said judgment (R. 304), the respondent corporation demanded of Henry a pledge of his shares in the family corporation to secure certain indebtednesses claimed to be owed to the respondent. On April 27, 1926, according to testimony of the Barcelouxs, the bankrupt brought with him to a purported meeting of the directors of the respondent his certificate representing his 2499 shares in the respondent corporation, bearing a blank endorsement, and also a blank pledge agreement. At said meeting it is claimed by the respondent that the blanks of said pledge agreement were filled out by the bankrupt to recite the pledge of his said 2499 shares to secure three items of preexisting indebtedness, claimed to be then owing to the corporation, totalling the sum of $27,814.48. After said meeting the bankrupt took with him said certificate and signed pledge agree-

ment (R. 309, 337), retaining both in his possession, as he claims, with other corporate records until he resigned as president on July 28, 1926 (R. 337). Said shares were found by the auditor, as of August 16, 1926, to be of the value of $94,949.66.

2. In the Spring of 1926, Freeman was seeking from the bankrupt security for the payment of said judgment, and succeeded on June 30, 1926, in obtaining from the bankrupt a deed of trust covering certain lands, which the bankrupt owned in common with his brother, George, subject to a substantial mortgage, the interest of Henry, the bankrupt, in said lands being already subject to a judgment lien in favor of Freeman; and at the same time the bankrupt assigned to Freeman, by way of pledge, his 2499 shares of the respondent corporation's stock, which the bankrupt told Freeman had been for a long period of time, and still was, subject to a prior pledge to the respondent corporation to secure a note in the sum of $24,000.00 (R. 402), but Henry, the bankrupt, did not reveal to Freeman that said shares were only recently pledged (April 27, 1926), in direct violation of his agreement not to so hypothecate his said properties. Freeman then sought from the respondent corporation an agreement that its pledge would not be foreclosed save after ninety days' notice to Freeman (R. 405), which agreement was refused (R. 409). The bankrupt testified that the assignment and purported agreement created a family "fuss," and that George Barceloux and Cora Gelinas wanted additional collateral and he gave it to them, and after that "they sold the stock and everything" (R. 368).

3. The respondent corporation executed to itself a certificate (bearing No. 12) covering said 2499 shares in its name as pledgee (Exhibit No. 3). Said certificate, which was dated June 29, 1926, and was taken, as stated, by George Barceloux, for the reason that he heard that Freeman got a deed of trust from the bankrupt on the Lake County Ranch and had recorded it. The deed of trust, however, was executed on June 30, 1926, and was recorded on July 3, 1926 (see Exhibit No. 16), four days later than the antedated Certificate No. 12 (see R. 32, and also R. 489, dissenting opinion by Judge Sawtelle).

4. On July 3, 1926, the Peter Barceloux Company obtained a pledge from the bankrupt of his remaining unencumbered properties, to-wit, his bank, insurance, and garage shares, valued by the master at $2158.00, as additional security for the indebtednesses that were already secured by the pledge agreement bearing the date of April 17, 1926, covering securities having a value of $94,000.00, more than three times the value of the indebtedness (R. 354).

5. On July 7, 1926, the bankrupt conveyed to his wife his equity of the value of some $2900.00 in some lands, for the purported consideration of $1000.00 (R. 355-356).

6. On July 28, 1926, the bankrupt sold his qualifying share in the respondent corporation to Cora Gelinas (sister) for $10.00, and resigned the presidency of the respondent corporation, which he had held for fourteen years (from its incorporation) (R. 370).

7. On August 16, 1926, the respondent corporation assumed to foreclose the pledges above described at a purported "public sale," held quietly without notice to Freeman or other creditors of the bankrupt, with scant or no publicity or outcry (R. 317, 323), and there offered all of the shares covered by the said pledges of April and July, 1926, *en masse,* and sold the same to itself for one consideration in payment of the three items of indebtedness recited in the written pledge agreement, together with three other items totalling the sum of $5929.00, which were not described or referred to in the written pledge agreement (R. 317). This sale was found fraudulent by the trial Court (R. 34), and in the majority opinion of the Circuit Court of Appeals it was said:

> "Such conduct does not appeal to the conscience of the chancellor" (R. 473).

8. On August 24, 1926, for the purported consideration of $2000.00, the bankrupt transferred to his sister, Cora Gelinas, certain bank shares, having a value of $24,100.00 and subject to a pledge in the amount of $13,800.00 (R. 389, 33), and on the same day the bankrupt made a substantial deposit to his son's account for "school expenses" (R. 371) and paid his son $1000.00 on account of a note dated 1915 and long outlawed, which was payable to the bankrupt's mother-in-law (R. 371).

9. In September, 1926, the respondent corporation assumed debts of the bankrupt in the amount of $16,000.00 owing to Crocker First National Bank of San Francisco, and took over all of his collateral security given therefor (R. 360, 361).

10. In October, 1926, the bankrupt transferred certain personal property to his attorney (R. 425).

After the date of the last transfer, the bankrupt had assets remaining which were listed in the inventory and appraisement filed by the trustee with the referee in bankruptcy, to whom the administration of said bankruptcy matter was referred, totalling approximately $652.18 (Complainant's Exhibit No. 23), or, as the bankrupt testified, "he had no property left of any kind" (R. 33, 489).

The bankrupt then, after waiting for a period exceeding four months, filed on February 25, 1927, a voluntary petition in bankruptcy.

IV.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

1. The Circuit Court of Appeals erred in denying the right of plaintiff to elect to sue for a recovery of the value of the shares of stock under National Bankruptcy Act, Section 70e, in a suit in equity, where, as appeared in this suit, defendant (after parting with all title to said shares) after issue joined, had repossessed itself of the certificate for said shares endorsed for transfer; and the Court erred in holding that under these circumstances a decree for recourse to the shares in specie was the only permissible relief, thus misconstruing said Section 70e and denying the right thereby given to this plaintiff to elect to seek value.

2. The Circuit Court of Appeals erred in entertaining a tender of the 2499 shares of the defendant's stock (being only a part of the shares pledged and involved) and in entertaining an offer of a release to be made by George A. Barceloux (not a party to this suit), which tender and offer of release were made for the first time on appeal, and as made, were contrary to the defenses and claims of full and valid legal title in the defendant made in its answer with a prayer that title be quieted and declared to be good and valid in it, the said action of the Circuit Court of Appeals being the reception of new evidence on appeal contrary to U. S. Code, Title 28, Section 863.

3. The Circuit Court of Appeals erred in assuming a jurisdiction belonging to a Court of bankruptcy, in that the decision of said Court undertakes to determine priorities and distributive rights in the 2499 shares ordered to be resold under the alleged pledge, in this suit in equity brought under National Bankruptcy Act, Section 70e, the jurisdiction of the bankruptcy Court to adjudge priorities being exclusive by virtue of National Bankruptcy Act, Sections 2 (7), 47 (a) (2), and 70 (b), (c).

4. The Circuit Court of Appeals erred in holding creditor Freeman estopped to assert fraud in the alleged pledge by reason of his having taken additional junior security, and in holding that plaintiff trustee, suing for all creditors, was also estopped by reason of Freeman's supposed estoppel and the elimination of all question of fraud thereby.

5. The Circuit Court of Appeals erred in holding that the defendant could, under the law of California,

resume title to its own shares by a voluntary retransfer to it after a sale of absolute title, without any evidence in the record to show that such retransfer was made to save itself from loss because of the insolvency of the purchaser, or his inability to pay the agreed price to the defendant, and without any evidence of any other fact which in law justifies such acquisition of its own shares.

6. The Circuit Court of Appeals erred in assuming to have jurisdiction over the 2499 shares of defendant's stock by reason of the introduction of the cancelled certificate No. 5 (Defendant's Exhibit No. 3, the stock book with certificate attached), which was put in evidence by plaintiff as proof bearing on fraud; and because George A. Barceloux, the transferee of and retransferor to defendant of the said shares, was not a party to this suit and hence would not be bound by the decree in that respect.

7. The Circuit Court of Appeals erred in reversing the decree of the trial Court for the value of the 2499 shares at the time of the purported pledge sale, contrary to its own finding that title to said shares was revested in defendant by the retransfer of the shares to it, disregarding thereby that the sale by it to George A. Barceloux was in law a conversion by the pledgee in repudiation of the pledgor's general property sufficient to sustain the decree as made.

8. The Circuit Court of Appeals erred in law in holding and finding that the purported delivery of the certificates by the pledgor to himself as president of pledgee corporation, himself keeping exclusive possession, constituted a valid pledge as against creditors.

9. The Circuit Court of Appeals erred in law in rejecting the trial Court's findings of fact that there was fraud in the alleged pledges, which findings were based on oral evidence of witnesses heard and observed by the trial judge, and also based on written evidence consistent with his findings and inconsistent with the Appellate Court's finding that the pledge was in good faith.

V.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

A. THE CIRCUIT COURT OF APPEALS ERRONEOUSLY CONSTRUED SECTION 70e OF THE NATIONAL BANKRUPTCY ACT BY REVERSING THE DECREE OF THE TRIAL COURT FOR MONEY, THEREBY DENYING TO THE TRUSTEE, PETITIONER HERE, THE ELECTION TO RECOVER VALUE IN A SUIT BROUGHT UNDER SAID SECTION; AND IN DENYING A MONEY DECREE FOR VALUE UNDER FACTS APPEARING IN THE RECORD WHICH MADE THAT THE ONLY RELIEF WHICH WAS POSSIBLE.

B. IN A FEDERAL EQUITY APPEAL, NO NEW EVIDENCE CAN BE RECEIVED (U. S. REV. STAT., SECTION 698; U. S. CODE TIT. 28, SECTION 863).

C. THERE IS NO JURISDICTION IN A FEDERAL COURT OF EQUITY IN A CONTROVERSY ARISING OUT OF BANKRUPTCY TO ADJUST THE PRIORITIES AND DISTRIBUTE THE PROCEEDS OF THE PROPERTY OF THE BANKRUPT ESTATE, THAT BEING THE EXCLUSIVE PROVINCE OF A COURT OF BANKRUPTCY UNDER NATIONAL BANKRUPTCY ACT, SECTIONS 2 (7), 47 (a), (2), and 70 (b), (c).

D. The Trustee is not precluded, in a suit on behalf of all creditors, from asserting that a transfer was fraudulent by the fact that one of the creditors took additional security which recited the existence of the transfer assailed as fraudulent.

E. Under the law of California, a corporation of that state is prohibited from acquiring its own issued shares except under circumstances none of which appear in this record (California Civil Code, Section 309, in force in 1926).

F. It was error for the Circuit Court of Appeals to assume jurisdiction over the 2499 shares of respondent Peter Barceloux Company's stock by reason of the mere intoduction of certain cancelled certificates in evidence.

G. The sale by the corporation of the stock acquired at a pledge sale held invalid constituted a conversion and therefore the money judgment was proper and should have been affirmed for that reason.

H. The decision of the Circuit Court of Appeals ignored and did not overcome the trial Court's finding that the pledge of April 27, 1926, was void as to creditors for want of immediate delivery and a continued change of possession as required by Section 3440 of the Civil Code of the State of California.

I. The trial Court's findings of fact should not be reversed on appeal when based upon the testimony of witnesses heard and observed by the

TRIAL JUDGE, AND ALSO BASED ON WRITTEN EVIDENCE CONSISTENT WITH HIS FINDINGS AND INCONSISTENT WITH CONTRARY FINDINGS.

A.

THE CIRCUIT COURT OF APPEALS ERRONEOUSLY CONSTRUED SECTION 70e OF THE NATIONAL BANKRUPTCY ACT BY REVERSING THE DECREE OF THE TRIAL COURT FOR MONEY, THEREBY DENYING TO THE TRUSTEE, PETITIONER HERE, THE ELECTION TO RECOVER VALUE IN A SUIT BROUGHT UNDER SAID SECTION; AND IN DENYING A MONEY DECREE FOR VALUE UNDER FACTS APPEARING IN THE RECORD WHICH MADE THAT THE ONLY RELIEF WHICH WAS POSSIBLE (SEE SPECIFICATION OF ERROR NO. 1, THIS BRIEF, PAGE 12, AND STATEMENT OF QUESTION INVOLVED NO. 1, PETITION FOR CERTIORARI PAGE 4).

This argument is in two parts denoted as "First" and "Second."

First.

The majority decision of the Circuit Court of Appeals (R. 475, 476, 481), as hereinafter more fully stated, was that the trustee has no right of election. The minority opinion was that such option existed (R. 497). The exact words of National Bankruptcy Act, Section 70e, in this particular, are:

> "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication."

The present suit was brought to recover value and not property.

The Circuit Court of Appeals ruled in the majority opinion that where the "property is subject to the jurisdiction of the Court" a money decree cannot be given (R. 475, 476), concluding that (R. 480):

> "They are only entitled to judgment for the value of the property *in the event and for the reason that the property itself could not be subjected to their claims. The substitution of the value of the property for the property itself is not a right of the plaintiff unless and until it is determined that the property itself cannot be subjected to his claim,* * * *." (R. 480, 481. Italics ours.)

Again:

> *"The trustee in bankruptcy acting for the creditors has no right of election"* (R. 481. Italics ours).

It cannot be said that the Circuit Court of Appeals, in the majority opinion, admitted the right of election by the Trustee and denied that this was a proper case for it. The decision was that he "has no right of election" (R. 481, middle of page).

The logic and plain words of this holding are that the Trustee has no choice between value and property under Bankruptcy Act, Section 70e; that he must take property or nothing, when property is available, and can take value only after the Court has found that he could not have recovered property; there is no choice.

In so holding, the Circuit Court of Appeals in the majority opinion held contrary to an earlier and plain decision of the Ninth Circuit Court of Appeals (*Schainman v. Dean,* 24 Fed. (2d) 475, at page 476, *certiorari* denied, 278 U. S. 598). The majority opinion is also contrary to and overrules the contention of Judge Sawtelle in the dissenting opinion (R. 497) that

> "Section 70e of the Bankruptcy Act * * * gives the trustee the unrestricted election of whether he shall sue for the property or its value."

The Ninth Circuit Court of Appeals in earlier cases implicitly recognized the right to have a value decree in a suit brought by election on the equity side of the Court.

Brainard v. Cohn, 8 Fed. (2d) 13, 15 (C. C. A. Ninth);

Oliver v. Brennan (In re Wright Motor Company), 299 Fed. 106, 108 (C. C. A. Ninth).

As a matter of fact and information, as shown by the two letters from the counsel for respondent to the Clerk of the Circuit Court of Appeals, which were filed as a part of the record of such Court in this cause (R. 452, 454), the respondent's position on this point does not appear to have been fully and clearly developed until reargument was had in the Circuit Court of Appeals at the instance of that Court, upon which reargument the respondent (the appellant) offered to tender 2499 shares of the stock of respondent into Court for disposal. The contention of respondent (appellant) in this connection was in sub-

stance that the property itself would thus be made recoverable *in specie,* and that in such a situation no money recovery could under any circumstances be decreed. This contention appears to have been an outgrowth of respondent's theory on the appeal below that a court of equity acts specifically and therefore could not decree value, but must decree property or nothing.

Section 70e of the Bankruptcy Act has stood without amendment as it was enacted in 1898, except for the amendment of 1903, which fixed jurisdiction of the Courts, and is mentioned here only for the purpose of showing that such amendment is in no wise involved. The rights which are given by Bankruptcy Act, Section 70e, are two:

First, the right to avoid a transfer which any creditor might have avoided had bankruptcy not intervened.

Second, if the Trustee succeeds in avoiding the transfer, he has the right to recover either the property or its value.

Upon a proper construction of this section the rights of the Trustee depend upon the rights of creditors only for the purpose of avoiding the transfer; the right of recovering the property or value, either the one or the other, depends solely upon the Bankruptcy Act. Thus the Bankruptcy Act added to the creditors' right to avoid the transfer a new and distinct recovery which the creditors might not or would not have had if bankruptcy had not intervened and one of them had sued. Conversely, if it had been the intention of

Congress to give the Trustee only those rights of annulment and of recovery which a creditor might have had if bankruptcy had not intervened and he had sued, then the section would necessarily read somewhat as follows:

> That the Trustee may avoid any transfer by the bankrupt of his property and may recover the property so transferred or its value from the person to whom it was transferred, as any creditor of such bankrupt might have avoided it and recovered.

This paraphrase of the section would have the effect of making the Trustee in such a suit a representative *of that creditor alone* who might have sued, and no recovery would be possible other than such creditor could have had. The other creditors would necessarily in a suit under such a statute recover nothing, and this supposititious statute and construction would have been contrary to what has been recently decided by this Court in *Moore v. Bay,* 284 U. S. 4, that the Trustee represents all the creditors and recovers for all of them, the recovery to be distributed *pro rata* among them. Any construction, therefore, which would limit the recovery of the trustee to the rights of a single creditor under local law must necessarily be rejected.

The following may be stated as reasons why Section 70e must be construed as giving, first, a right to avoid, and, second, a right to recover for all creditors the property or its full value. The central purpose of the Bankruptcy Act is to gather into the proceedings in bankruptcy all the estate of the bankrupt, including

property fraudulently conveyed by him in fraud, delay or hindrance of his creditors. As expressed in Bankruptcy Act, Section 47 (a) (2), it is the duty of the Trustee to

> "* * * collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest."

In due course thereafter the money is to be distributed to creditors in dividends. The last quoted words from Section 47 (a) (2) were also in the Bankruptcy Act as first enacted in 1898, and, therefore, it is plain that the object of Section 70e was to give the Trustee a right to sue which would adequately enable him to perform the duties imposed by Section 47 (a) (2). To perform the duties so imposed, he is given the power by Section 70e to avoid any transfer which any creditor might have avoided if bankruptcy had not intervened. In legal effect, such an avoidance of the transfer would revest the property in the bankrupt who had fraudulently transferred it, and, if Section 70e had gone no further, the Trustee might then have been obliged to bring further suits at law or in equity to recover the property or its value, as the facts of the case would permit. However, in furtherance of his duty to reduce the estate to money and close up the estate as expeditiously as would be compatible with the best interests of the parties in interest, it was necessary for Congress to give the Trustee, in the suit to avoid the transfer (in order that complete relief might be had) the additional right of an abso-

lute election to recover the property or its value. This election is vested in the Trustee because, if a fraudulent transfer made more than four months before the adjudication in bankruptcy were merely avoided by a Court of equity doing nothing more, the title then revesting in the bankrupt, the Trustee might then proceed to reclaim and possess the property, if he chose. [Such a right of reclamation is in fact given as to transfers made within the four months' period by Section 67e]. Two actions would be required or might be required under such a construction to obtain possession of the property, and after such actions the Trustee would be obliged to sell the property or in some manner convert it into money for distribution, a most dilatory procedure that would cause creditors to lose by delay and expense, if not in other ways. Therefore, the plain purpose of Section 70e is to dispose of the suit expeditiously in one decree, culminating in whatever judgment would be proper and expedient to the prompt disposition of the estate and distribution of money.

We think the foregoing shows that the construction for which we contend is agreeable to the spirit of the Bankruptcy Act and the only construction which is proper under that spirit, but it is also agreeable to the pervading spirit and principles of equity. It would be contrary to the principles of equity to construe Section 70e in such wise that the decree must always be for surrender of the property, if available, but if not available, then only for its value at the date of the wrong. So to construe the statute would have the effect of leaving open to the wrongdoer, the fraud-

ulent transferee, the ability to withhold both the property and its value until the outcome of the judgment showed which would be most profitable for him to choose in satisfaction of the decree. Counsel know of no rule or precedent in an ordinary creditor's suit which gives the fraudulent transferee such an advantage or right to speculate in fluctuations at the expense of the creditors. In the eyes of equity, the injury is done to the creditors at the time the fraud upon them was committed, but the quantity of that injury measurable in money is determined by what the creditors might have realized, up to the amount of their debts, if the property had been available to satisfy those debts in due and regular course. If this be true, and counsel believe it to be elementary, then it must be still more obnoxious to the principles of equity that a fraudulent transferee could put the property out of his possession, render himself unable to return it, next obtain possession after he was sued, and then surrender it to avoid responsibility for its value. There is no known principle of equity which gives a wrongdoer an election to choose and dictate the least costly way out of his predicament.

It is not necessary to rest here. An analogy exists indicative of the proper construction.

There are two sections in the Bankruptcy Act which give a right to avoid a transfer, and coupled therewith, a right to recover the property or its value. First, Section 60b, which relates to unlawful preferences, gives that right; and, second, Section 70e, which relates to fraudulent conveyances, gives that right.

Although this Court has not decided just what the right of election is under Section 70e, it had that question before it, arising under Section 60b, in *National City Bank v. Hotchkiss*, 231 U. S. 50. At page 59 it appears that the suit was one in equity to recover *in specie* certain securities, which had been transferred by way of unlawful preference. After the suit was begun, the parties, by a stipulation, authorized the transferee to sell the securities and to hold the proceeds, subject to the outcome of the litigation. The securities were not sold and subsequently declined in value. When the case came to final decision, the Trustee claimed the right to have the value of the securities as of the time of the preferential transfer instead of the securities themselves, which he had sued for, contending that the statute gave him this right of election. This Court sustained the decision of the District Court that such right had been waived by suing for the specific securities and by stipulation that they might be sold. By this decision this Court recognized that an election had been made, and held that, having once been made, the Trustee must abide by it. It is true that this Court's decision in that case did not pointedly and specifically decide that the Trustee could elect to recover value instead of property, but that is the necessary implication of the decision. This Court held that the Trustee could not revoke his election or waive it and newly elect. In holding that the Trustee must stand by his election, this Court must have held that he had a right to elect. Moreover, in that case the right to elect was directly raised and was before the Court, as appears from

excerpts in the briefs filed in behalf of the Trustee in that case (see 58 L. Ed. U. S., page 119), since the Trustee there contended:

> "The statute gives the trustee the right to recover the value of the securities or the securities themselves, at his election.
>
> Collier, Bankr., 8th ed. 1910, page 675; re Phelps, 3 Am. Bankr. Rep. 396."

Counsel believe it fair to conclude that the right of election, which this Court in that case tacitly recognized to exist by denying that it could be recalled, was such right of election as was in that case contended for.

In *Collier on Bankruptcy,* 1925 Ed., page 1330, the corresponding matter is found in the following words (referring to Sec. 60):

> "Subdivision b provides the trustee may recover the 'property or its value.' Similar words were used in the law of 1867. The option of suing for the property or its value rests with the trustee. These words are doubtless merely expressive of the rule of law. In most cases, the value, *i. e.,* damages, is demanded."

The case of *In re Phelps,* 3 Am. Bankr. Rep. 396, an opinion by a referee contains language which counsel desire to quote hereafter and adopt, because of its pertinence. A motion was there made to instruct the Trustee to bring a suit to recover an unlawful preference. The referee, in stating one of the questions at issue, said, at page 399:

> "If such an action can be brought, should the trustee be permitted to sue for value or only for the goods?"

Thus was presented at the outset the contention which respondent (appellant below) made in the Circuit Court of Appeals.

It was contended before the referee (page 402):

> "* * * that the words 'he may recover property or its value,' found in section 70e, really mean that if the creditor has disposed of the goods, or cannot restore them, he can be sued for the value, but that if he has not or cannot, the suit can only be for the goods; (citing cases). * * * The natural meaning of the words is that the trustee may elect which he shall do."

This is precisely the contention which respondent makes in this case (see R. 91, Ground No. 7 of notice of motion to vacate and set aside interlocutory decree) and which was also specified in its assignment of errors (R. 107).

The referee in his opinion concluded (3 Am. Bankr. Rep. 403):

> "* * * an important principle is involved, and, much though I sympathize with the unfortunate condition in which the Fuller interests find themselves, I cannot consent to go on record as approving the doctrine that a creditor or class of creditors can attempt a fraud on other creditors and, after an adjudication in bankruptcy, come into Bankruptcy Court practically admitting the fraud, but offering to restore the property fraudulently transferred. Many cases might arise in which it would be vastly to the injury of the other creditors if such a proceeding were tolerated. In my own experience, a collusively

secured creditor has, in one case, broken into the store of the bankrupt, which was constructively *in custodia legis,* an adjudication having been made, but the first meeting not having been held, and forcibly removed the goods, including expensive fixtures, thus largely decreasing the value of the estate. While this was done after the adjudication and with knowledge of it, yet the same thing might be done collusively before adjudication. In neither case should such a creditor be allowed to restore only, but should be charged with some penalty for his acts. In short, the words of the statute are clear; the trustee can sue for goods or for value. A collusive transfer is not a crime, but it is a wrong on other creditors. The courts cannot punish; they should, if possible prevent such practices. At any rate, they should set their faces against the doctrines of repentance and absolution as applied to bankruptcy proceedings."

Second.

If this Court should conclude that the majority decision of the Circuit Court of Appeals was correct wherein it held that the Trustee has no right of election, nevertheless under Section 70e, property or value are made alternatives, and the one or the other may be recovered. Under the pleadings in this case and the evidence shown by the record, the Trustee in any view and by either construction correctly brought this suit within that statute. It appears by the record that the suit was brought for the recovery of value, alleging that the property was no longer in the possession of the respondent, which,

as a pledgee, sold its own shares, bought them in at its own pledge sale, thereafter sold them to George A. Barceloux (R. 25, 26), and twelve days after the answer was filed in this case, attempted to take those shares back by a retransfer from George A. Barceloux to itself (R. 322, 418, 419). Paragraph IX of the answer admits the transfer to George Barceloux and by a negative pregnant alleges that George Barceloux had at some time thereafter transferred the shares to some presumably bona fide holder for value, identity not disclosed. Plaintiff could rest on that without amending to plead and prove that the respondent had not only made it impossible to recover the specific shares from it, but had in legal effect, attempted to convert its rights from those of a special proprietor in pledge to that of a general and unlimited owner of the shares.

A situation very similar to the case at bar, except that it was a preference under Section 60b of the Bankruptcy Act, was presented in the case in equity of *Feilbach Co. v. Russell,* 233 Fed. 412 (Sixth C. C. A.), where, on pages 414 and 415, in discussing this, the Circuit Court of Appeals sustained a judgment for value under the following circumstances: The Feilbach Company, holding a mortgage which was an unlawful preference, assigned it to Peavey. Peavey foreclosed the mortgage as assignee thereof, and thus obtained possession of the mortgaged property. He was co-defendant with the Feilbach Company in the suit for value. He was thus a defendant in possession of the specific property which was the subject of the preference. The Sixth Circuit Court of Appeals said, on page 415:

> "He obtained possession of the mortgaged property and, through foreclosure proceedings, converted it to his own use. Upon the plainest principles of law, he became liable for its value when the mortgage was set aside."

This is a clear decision in a preference case and in equity that value may be awarded, notwithstanding that property could have been reclaimed in specie. The right to elect to recover value is affirmed by necessary implication.

Another and more recent case, also a preference case, in which value was decreed although the property was at the time in possession of the defendant, is *Irving Trust Company v. Siroty,* 60 Fed. (2d) 71 (Second C. C. A.). In that case, certain clothing had been repossessed by the defendant from the bankrupt by way of preference, and for the first time on appeal the defendant urged that because Section 60b allows the Trustee to recover the property or its value, the decree for value was wrong and should have been a decree for the property, because the property remained in the possession of defendant. The suit, as in the case at bar, was a suit for the value of the property and for an accounting. At the trial, though it appeared that the property was still in the defendant's possession, proof of value was received without objection. The Circuit Court of Appeals, characterizing the objection as an afterthought first presented in a reply brief, declined for that reason to consider the point on appeal, and sustained the value decree in so far as it applied to the specific property. It did not intimate, how-

ever, that if the question had seasonably been presented, any different result would have been reached.

In the case at bar, the objection was not made in the trial Court. On the hearing before the master to take evidence of value, counsel for the defendant (respondent here) stated that the question "is the value of the stock of the Peter Barceloux Company" (R. 77), thus admitting that such evidence was competent. An exception was taken to the master's report (R. 65), that the master "instead of following the directions of the interlocutory decree and finding the highest market value * * * has placed a value on each asset of the corporation," admitting again that value was in issue and evidence properly received. After the decree was entered, it was assigned for error (R. 107, 108), that the Court had no jurisdiction to enter the money judgment and that the same was beyond the jurisdiction of the Court, because the shares now in question were in the possession of the defendant and the only proper relief was to annul and cancel the transfer and to adjudge and decree the return of the stocks (Assignments First and Second). It thus appears that these assignments are not supported by any ruling evoked by an objection made at the trial.

At the trial of the case it appeared from the testimony of George A. Barceloux that not until twelve days after the answer was filed, to-wit, on May 11, 1930, were these shares retransferred by him to defendant Peter Barceloux Company (R. 419). There was nothing in the answer to show that defendant Peter Barceloux Company was in a position

to redeliver the shares which by its own admission had passed out of its ownership. Thus, it appears by the record that when the suit was brought and when issue was joined on the bill, the admitted facts as well as the proven facts show that a suit to recover the specific shares would have been abortive and fruitless, and that a suit for value was the only one which the Trustee could have brought with any hope of success. If the law made the election, then the Trustee in this suit has elected that which the law made for him. For this reason, if the Circuit Court of Appeals correctly held (which we do not concede) that Section 70e gives the Trustee no right of election, nevertheless, the judgment of the Circuit Court of Appeals was erroneous, because the decree of the trial Court is rightly founded upon the election made by the law.

It may be added, in explanation of the decision of the Circuit Court of Appeals, that strong reliance was placed by that Court (R. 479) upon *Dunphy v. Kleinschmidt,* 11 Wall. 610. Upon the supposed authority of that case, the Circuit Court of Appeals said (R. 480), that the plaintiffs "are only entitled to judgment for the value of the property in the event and for the reason that the property itself could not be subjected to their claims." It need only be said that *Dunphy v. Kleinschmidt* did not so decide. The reversal of the *Dunphy* case was made because the trial Court, in a suit begun in equity, did not continue to proceed as such, but reverted to a verdict of a jury for damages instead of going on to an accounting. It is not necessary to engage in

further discussion of this case; it suffices merely to cite *Mann v. Appel,* 31 Fed. 378, where, at page 383, the doctrine of *Dunphy v. Kleinschmidt* is explained in support of the right to bring and sustain a suit in equity for value where a legal remedy existed which might have proved less adequate.

B.

IN A FEDERAL EQUITY APPEAL, NO NEW EVIDENCE CAN BE RECEIVED (U. S. REV. STAT. SECTION 698; U. S. CODE TIT. 28, SECTION 863). (SEE SPECIFICATION OF ERROR NO. 2, THIS BRIEF, PAGE 13, AND STATEMENT OF QUESTION INVOLVED NO 2, PETITION FOR CERTIORARI, PAGE 5.)

The offer of respondent made in the Circuit Court of Appeals upon reargument to tender the 2499 shares of respondent's stock into Court for disposal, evidenced by the two letters set forth (R. 452 to 454), was not only an offer of new evidence on appeal, but was also tantamount to the pleading of new defenses on appeal. It is settled by the previous decisions of this Court that it is error for the Supreme Court to receive new evidence upon an appeal.

Blease v. Garlington, 92 U. S. 1, 4;
Roemer v. Simon, 91 U. S. 149, 150.

It is also settled that it is error for a Circuit Court of Appeals to receive new evidence.

Realty Acceptance Corp. v. Montgomery, 284 U. S. 547, 549.

The Second Circuit has also recently declared that affidavits not offered on trial could not be received upon appeal.

Youngs Rubber Co. v. C. I. Lee & Co., 45 Fed. (2d) 103 (Second C. C. A.).

The Ninth Circuit recently refused to consider a stipulation not submitted to the trial Court and not the basis of any ruling therein.

The Rethelulew, Official Number 227,860, 51 Fed. (2d) 646.

It will be noted that the letter set out (R. 453) contains an offer to file with the Circuit Court of Appeals a full and complete release executed by George A. Barceloux (not a party to the suit) disclaiming any interest in the stock in question. While no formal release appears to have been filed as there suggested, such release would have been evidence tending to show that the tender was good because the title to the shares was good, and the admissions or statements made in that letter have the same evidentiary tendency and must have been and were considered by the Circuit Court of Appeals in reaching the conclusion that the 2499 shares were within its jurisdiction, and subject to disposal by its judgment. In the majority opinion of the Circuit Court of Appeals in this case, it is said (R. 473) that "the company has tendered the stock to the clerk of the Court for such disposition as may be made thereof in equity and good conscience." There is nothing in the record to show that any tender whatever was made in the trial Court, and in fact none was made. To the contrary, the answer prays:

> "that the title of the Peter Barceloux Company in and to the securities in this answer herein mentioned, be declared to be good and valid;" (R. 28).

The record shows that there was no tender made in the trial Court, nor was there any evidence suf-

ficient in law to show that the trial Court had obtained jurisdiction over those shares. The record shows that the stock-book of Peter Barceloux Company was introduced in evidence by the plaintiff (R. 302), and such stock-book is plaintiff's exhibit No. 3 sent up herewith, in which Certificate No. 5 for 2499 shares issued to Henry Barceloux and thereafter cancelled, and Certificate No. 12 issued in lieu of No. 5 to the Peter Barceloux Company, as pledgee of the same shares, also thereafter cancelled, both appear attached to said stock-book. No certificate evidencing the ownership of said shares at the time of the trial was put in evidence by either party, and no evidence of the actual ownership of the 2499 shares at the time of trial appears in the record, except the certificate stubs found in said stock-book. The record, therefore, not only does not show any tender into the trial Court, but rebuts it. At another part of the record, it appears that at the time of the final decree in the District Court, a tender of all the shares pledged and sold *en masse* would have been impossible because some of them (certain bank, garage and insurance shares) included in the alleged pledge had been sold again by the defendant, after it received them by retransfer from George A. Barceloux, and those shares were no longer in defendant's possession or control (R. 180, 182, 189, 190). In denying rehearing, the Circuit Court of Appeals took cognizance of this fact, and credited the found value of these bank, garage and insurance shares upon the pledge debt (R. 507).

The statutory prohibition of the consideration of new evidence in an equity appeal in a federal Court

has existed continuously since the Act of 1803 (2 Stat. 244), which established the present mode of equity appeals. Until 1891, this limitation applied to the Supreme Court and to the Circuit Courts when sitting as courts of appeal, and by the Act of March 3, 1891, Ch. 517, Section 11 (26 Stat. 829), it was enacted:

> "And all provisions of law now in force regulating the methods and systems of review, through appeals and writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeal, * * *."

It is therefore settled that anything which amounts to the consideration of new evidence—facts not considered by the trial Court and not in the record—must not be considered in an equity appeal for the purpose of arriving at a different decree upon the merits from that which was given by the trial Court.

It is pertinent to consider whether a tender is new evidence or a new pleading of defense under such circumstances as surrounded its making in this case. If the tender was intended as a defense to the right to a money decree, then under New Equity Rules 29 and 30, it should have been made in the answer. The answer quite plainly excludes any such construction, for it prays (R. 28, paragraph III):

> "That the title of the Peter Barceloux Company, of, in and to the securities herein held by it, and that the title of the [23] Peter Barceloux Company in and to the securities in this answer herein mentioned, be declared to be good and valid; and that it have its costs herein."

To make a tender in the Appellate Court was tantamount to a material amendment of the answer, and as already said, a release or any admission or showing of title in the defendant made in that connection was merely irrelevant evidence tending to show that the tendered title was good.

The result of entertaining the tender and acting upon it, by giving the directions contained in the decision of the Appellate Court (R. 482, 483), was to direct such a decree as the trial Court itself could not have made. That, under the decisions of this Court, is error.

Lane v. Pueblo of Santa Rosa, 249 U. S. 110, 114;

Realty Acceptance Corp. v. Montgomery, 284 U. S. 547, 551.

Candor requires that it be mentioned that the Circuit Court of Appeals (R. 482) speaks of the attempted retransfer of the tendered shares by George A. Barceloux to the respondent (defendant below) as restoring the "*status quo.*" It seems moderate to say that no tender made for the first time on appeal could put the parties back into the *status quo* of the day when issue was joined, or even of the trial day. On the latter day the record of pleadings and proofs closes finally. Who can say what alteration of the *status quo* occurred between then and the time of submission of the cause on appeal? All intervening facts are purely speculative in the Appellate Court.

While no federal precedent has been discovered in which there was an attempt upon appeal to make a

tender which was not made upon the trial, yet respectable authority may be found condemning that practice. On the precise point in Massachusetts, it was held that tender is a matter to be pleaded or made below, and if not then made, cannot be pleaded on appeal.

> *Grover v. Smith,* 165 Mass. 132, per Holmes, J., on authority of *Brickett v. Wallace,* 98 Mass. 528.

Thus, to summarize this branch of the argument, the action of the Circuit Court of Appeals in receiving and considering the tender not only violated the statutory rule against the consideration of new evidence, but also departed from settled principles of appellate review, in that the Circuit Court of Appeals attempted to do more than correct the errors of the trial Court. While a federal equity appeal retries the case *de novo,* it does so only to the extent of the case as appearing by the record.

Mr. Chief Justice Taft, in *Keller v. Potomac Electric Power Company,* 261 U. S. 428, 444, describes the function of an equity appeal in the following language:

> "In that procedure, an appeal brings up the whole record and the Appellate Court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witnesses."
>
> See, also, *U. S. Rev. Stat.,* Sections 698, 1011, 1012 (U. S. Code Tit. 28, Sections 863, 879, 880 (Supp.)).

This, it is settled that the power to reverse is and must be based upon the commission of an error by the trial Court, as shown by the record of the equity appeal. A reversal on extrinsic facts is necessarily forbidden, and while counsel believe and urge that the Ninth Circuit Court of Appeals in this case did reverse on extrinsic matters and thereby departed from firmly settled principles of appellate review, in a way which is believed to set up a dangerous precedent, this contention is made with all due respect to the Ninth Circuit Court of Appeals, the judges of which certainly have every wish to refrain from creating dangerous precedents. The supervisory powers of this Court exist, however, to enable it to resist the beginnings of bad practices and the establishment of bad precedents, and we ask that this power be now exercised.

C.

THERE IS NO JURISDICTION IN A FEDERAL COURT OF EQUITY IN A CONTROVERSY ARISING OUT OF BANKRUPTCY TO ADJUST THE PRIORITIES AND DISTRIBUTE THE PROCEEDS OF THE PROPERTY OF THE BANKRUPT ESTATE, THAT BEING THE EXCLUSIVE PROVINCE OF A COURT OF BANKRUPTCY UNDER NATIONAL BANKRUPTCY ACT, SECTIONS 2 (7), 47 (a), (2), AND 70 (b), (c). (SEE SPECIFICATION OF ERROR NO. 3, THIS BRIEF, PAGE 13, AND STATEMENT OF QUESTION INVOLVED NO. 3, PETITION FOR CERTIORARI, PAGE 5.)

The Circuit Court of Appeals in its opinion reverses and remands the cause to the trial Court, "to fix the time, place and terms of the sale of said stock, and to direct the application of the proceeds of the

sale in accordance herewith" (R. 483). This has reference to that part of the opinion immediately preceding, in which the Circuit Court of Appeals holds that the stock should be resold under the pledge, subject to,

> "an application of the proceeds to the claims of the Barceloux Company aggregating $33,184.41. * * * If all the stock pledged to the Peter Barceloux Company sells for more than the amount due to that company as herein determined, the surplus shall be paid to the trustee to be applied to the claim of Freeman, as alleged in the complaint or bill, herein, and if there be any surplus over and above the claims of the Peter Barceloux Company and of Freeman, the balance should be applied to the claims of the general creditors" (R. 482, 483).

This direction casts upon the trial Court in equity the exclusive duty of the Trustee to collect, sell and reduce to money the property of the estate for which he is Trustee, all of which must be done under direction and approval of the Bankruptcy Court (Bankruptcy Act, Sections 47 (a) (2) and 70 (b)). The Trustee must make the conveyance (Bankruptcy Act, Section 70 (c)). Exclusive jurisdiction is specifically given to the Court of Bankruptcy by Bankruptcy Act, Section 2 (7).

Freeman was not a party to the suit, having been dismissed therefrom before the trial (R. 29), and thus no claim of his remained involved in this suit.

This Court has decided that how the fruits of the litigation shall be distributed is for the Bankruptcy

Court in which the proceeding is pending to determine.

Globe Bank & Trust Co. v. Martin, 236 U. S. 288, 304.

In *Isaacs v. Hobbs Tie & Timber Company,* 282 U. S. 734, at 738, speaking of the adjustment of the priorities of conflicting claimants asserting liens existing at the time of the commencement of the bankruptcy proceeding, this Court has said:

> "* * * it is solely within the power of a court of bankruptcy to ascertain their validity and amount and to decree the method of their liquidation. * * * The exercise of this function necessarily forbids interference with it by foreclosure proceedings in other courts, which save for the bankruptcy proceeding would be competent to that end. * * *
>
> The jurisdiction in bankruptcy is made exclusive in the interest of the due administration of the estate and the preservation of the rights of both secured and unsecured creditors. * * *
>
> Indeed, a court of bankruptcy itself is powerless to surrender its control of the administration of the estate."

The directions given by the Circuit Court of Appeals are in conflict with the principle there laid down and with the statute.

The foregoing need not be further elaborated, except to point out that the Bankruptcy Court and its officers might be seriously embarrassed in adjusting the priorities among creditors if this case culminated in such a decree as the Circuit Court of Appeals directed the District Court to make.

D.

THE TRUSTEE IS NOT PRECLUDED, IN A SUIT ON BEHALF OF ALL CREDITORS, FROM ASSERTING THAT A TRANSFER WAS FRAUDULENT BY THE FACT THAT ONE OF THE CREDITORS TOOK ADDITIONAL SECURITY WHICH RECITED THE EXISTENCE OF THE TRANSFER ASSAILED AS FRAUDULENT. (SEE SPECIFICATION OF ERROR NO. 4, THIS BRIEF, PAGE 13, AND THE STATEMENT OF QUESTION INVOLVED NO 4, PETITION FOR CERTIORARI PAGE 5.)

In the case at bar, the majority of the Circuit Court of Appeals held that creditor Freeman was estopped to assert fraud in the pledge herein assailed of the Peter Barceloux Company shares, because Freeman had taken an assignment or pledge of the same shares reciting the existence of a prior pledge of the shares to the Peter Barceloux Company itself. The Circuit Court of Appeals held that since the pledge agreement to Freeman, dated June 30, 1926, recited that it was subject to a prior pledge to the Barceloux Company, Freeman is estopped from attacking the validity of the prior pledge or from asserting that it was made to defraud creditors (R. 466), and that since the complaint failed to allege in clear terms that there were other creditors than Freeman at the time of the alleged fraudulent transaction, and since the proof at the trial failed to show the existence of other creditors [the opinion infers their existence, R. 472], or that they were defrauded thereby, there was no justification for a decision in favor of the Trustee on appeal based upon the rights of other creditors (R. 472).

The majority opinion containing a discussion of the estoppel doctrine (R. 466) is followed (R. 470) by a statement that the question of whether there was any

valid delivery of the pledge "might affect other creditors, but as to Freeman was immaterial because he accepted and ratified the later transaction (1926), pledging the stock to the company, believing, as he says, that there was ample equity to secure his claim." This is followed (R. 472) by a statement that:

> "So far as the right of the trustee in bankruptcy is predicated upon the right of Freeman to question the pledge to the company it cannot be sustained for he cannot complain of the prior pledge to which he assented."

Thus, it appears that the estoppel doctrine was introduced by the Circuit Court of Appeals in such a way as to confess that there was fraud as against Freeman, but to say he waived it and ratified the transaction, and in such a way as to concede that there were other creditors who may have been defrauded but to deny the right of the Trustee to rely on the fraud as to them by reason of the estoppel found against Freeman. Parenthetically, it may be observed that these concessions by the Circuit Court of Appeals that there was fraud and a subsequent ratification go far to destroy for inconsistency any finding by the Circuit Court of Appeals that the pledges were fair and free from fraud; but that will be argued in another portion of this brief (see *infra*, page 62). The opinion of the Circuit Court of Appeals applying the estoppel doctrine is erroneous in several particulars, in this:

(a) The Trustee is not precluded from asserting fraud unless all of the creditors, then existing and who might have asserted it, are estopped.

(b) This is not a suit by Freeman through the Trustee to enforce his junior pledge, and in such a suit only would he be estopped by such a recital.

In support of the first reason herein designated as (a), we submit that the Court erred in finding that Freeman was the only creditor upon whom the Trustee petitioner predicated his suit. The bill of complaint alleged that the bankrupt and the transferee consummated the transaction with intent to hinder, delay and defraud all non-kindred creditors (R. 5, 6, 8, 9 and 10), and that there existed at the times in question many unsecured creditors of said bankrupt (see Paragraph VII of the Bill of Complaint, R. 8). It is not necessary that the bill of complaint set forth the names of and the amount due to each of the creditors then existing, as the Circuit Court of Appeals holds, but a general allegation that there were creditors is sufficient.

See:

Collier on Bankruptcy, 1925 Ed., page 1782;
Keller v. Fowler Bros. & Cox, 148 Tenn. 571;
Dodd v. Raines, 1 Fed. (2d) 658 to 660; and
Flanders v. Coleman, 250 U. S. 223, 229.

The proof supported the pleading in this: that the bankrupt testified that at the time of the transfers he was indebted to fourteen unsecured creditors to whom he owed the total sum of $28,537.97, exclusive of the claims of Freeman, as administrator, and the Barceloux Company (R. 357-361). He was also indebted to secured non-kindred creditors other than Freeman in the total of $54,649.68 (R. 360, 389). His testimony was corroborated (R. 294) by the introduc-

tion as exhibits of the verified proofs of claims filed in the bankruptcy proceeding, which showed total unsecured claims in excess of $40,000.00 owing to parties other than Freeman, as administrator, and the Barceloux Company at the time of the various transactions (Plaintiff's Exhibit No. 1, R. 294). The trial Court found that there "were many [creditors] and represented by plaintiff herein" (R. 34). All creditors then existing were defrauded thereby, as shown by the fact that the bankrupt transferred all of his properties to the respondent herein and members of his family, and when adjudicated he had no properties remaining from which these non-kindred creditors could satisfy their demands (R. 33). Under local law, intent to defeat any creditor renders the transfer void as to all who were then his creditors (see Section 3439, Civil Code of the State of California, and also Section 3440 of said Code).*

The decision of the Circuit Court of Appeals deprives the Trustee (an officer of the Court) of the right of representing all creditors granted to him by Section 70e of the National Bankruptcy Act and places a construction upon said section in direct conflict with the decision of this Court, rendered since the trial of the case at bar, in *Moore v. Bay,* 284 U. S. 4.

In support of the second ground designated above as (b), we submit:

This is not an action to enforce Freeman's pledge, and the Trustee in Bankruptcy in the case at bar did

*See sections in full in appendix.

not represent Freeman as a pledgee or under his said pledge agreement. It is only the rights of the general unsecured crditors that passed to the Trustee under Section 70e of the National Bankruptcy Act, and therefore the Trustee represented Freeman as to that part of his claim against the bankrupt which remained unsecured, as shown by his proof of debt filed in the bankruptcy proceeding (see Plaintiff's Exhibit No. 1).

Further, the cases upon which the Circuit Court of Appeals relies as the basis for its holding upon estoppel do not warrant the construction given them. They were all suits to foreclose second mortgages which contained recitals that they were such and subject to prior mortgages. Where a party to such a second mortgage seeks relief upon his right as a common creditor independent of his contract of mortgage, the principles therein announced are not applicable.

Old National Bank v. Heckman, 148 Ind. 490, 507;

Jones on Mortgages, Eighth Edition, Volume 2, Section 912, page 256.

It is patent that Freeman's admission of the existence of a prior pledge was not an admission that it was valid, even had there been reliance and change of position in consequence which there was not. Besides, Freeman is an administrator who could not make such a binding admission or become estopped thereby.

E.

UNDER THE LAW OF CALIFORNIA, A CORPORATION OF THAT STATE IS PROHIBITED FROM ACQUIRING ITS OWN ISSUED SHARES EXCEPT UNDER CIRCUMSTANCES NONE OF WHICH APPEAR IN THIS RECORD (CALIFORNIA CIVIL CODE, SECTION 309, IN FORCE IN 1926). (SEE SPECIFICATION OF ERROR NO. 5, THIS BRIEF, PAGE 13, AND STATEMENT OF QUESTION INVOLVED NO 5, PETITION FOR CERTIORARI, PAGE 6.)

The Circuit Court of Appeals held that the defendant (respondent herein) acquired legal title to the 2499 shares of its own stock by a transfer from George A. Barceloux, who had purchased these shares from it after it had bought them in at the alleged pledge sale (R. 481), and that the retransfer of the stock of the corporation to itself merely restored the *status quo* and was in "no sense a purchase by the corporation of its stock in violation of the statutory rule" (R. 482). The law in the State of California at the time in question and at all times since has forbidden a corporation to repurchase its own stock except under specified conditions, and the transaction shown in this record is not one of them (see Section 309 of the Civil Code of the State of California prior to 1931; thereafter Section 342 of the Civil Code of the State of California*).

The Circuit Court of Appeals relies in support of the above holding on *Ralston v. Bank of California,* 112 Cal. 208 (R. 482). The construction thus given is in direct conflict with later and ruling decisions of the State of California. See *Stevens v. Boyes Hot*

*The above Civil Code sections are set out in full in the appendix.

Springs Company, 113 Cal. App. 479, 482, in which a hearing in the Supreme Court of California was denied on June 11, 1931, and which was thus made the ruling decision on California law in this regard. See, also, *Wagg v. Toler,* 80 Cal. App. 501, 510, prior thereto.

In *Stewart v. Stewart Hotel Company,* 33 Cal. App. 167, at 182 (a rehearing was denied by the Supreme Court of California), the highest Courts of California have held that the liability of a stockholder secured by his stock is an asset of the corporation and if the stockholder is solvent and able to pay, the corporation would have no more right to exchange that asset for his stock than to buy the stock outright.

Since the record does not show that George A. Barceloux was insolvent, the corporation's attempt to repurchase said stock was, under local law, as stated in *Stevens v. Boyes Hot Springs Co.,* 113 Cal. App. 479, 482, both *ultra vires* and *malum prohibitum,* and hence, utterly void and incapable of estoppel. The direction of the Circuit Court of Appeals being based upon the theory that title was reinvested by a transfer which the courts of California hold void, the appellee's (petitioner herein) only available remedy is a money decree based on value, and the tender elsewhere discussed in this brief is ineffectual.

When George A. Barceloux, on May 11, 1928, by agreement turned back the 2499 shares of the Peter Barceloux Company stock to that corporation, and the bank, garage and insurance shares which he had purchased from that corporation, after it had bought

all of them in, *en masse,* at pledge sale, that was (as far as the 2499 shares were concerned) a withdrawal of the capital or assets of the Peter Barceloux Company, because George Barceloux testified, and it is uncontradicted, that "the note was handed to me and they retained the stock and I don't know whether I destroyed the note," etc. (R. 419). This note was an asset of the corporation, and for that reason the transaction fell within the condemnation of California Civil Code, Section 309, as it then stood. The Ninth Circuit Court of Appeals has also voiced its condemnation of transactions tending to withdraw capital from a corporation in violation of Section 309 of the California Civil Code. See:

Oliver v. Brennan (in re Wright Motor Company), 299 Fed. 106, 108.

It is patent that the same reasoning found in the above case applies and condemns the transaction, whether the corporation be the bankrupt, as it was in the case just cited, or a fraudulent transferee of the bankrupt, as in the case at bar. The Ninth Circuit Court of Appeals having correctly followed the local law in this particular, in *Oliver v. Brennan,* supra, should have followed it in the case at bar.

Had the Circuit Court of Appeals done so, there could be no claim or valid contention that the 2499 shares of respondent's stock was in Court and subject to disposal by decree in this case. The money decree must have stood, fraud and value having been found by the trial Court.

F.

IT WAS ERROR FOR THE CIRCUIT COURT OF APPEALS TO ASSUME JURISDICTION OVER THE 2499 SHARES OF RESPONDENT PETER BARCELOUX COMPANY'S STOCK BY REASON OF THE MERE INTRODUCTION OF CERTAIN CANCELLED CERTIFICATES IN EVIDENCE. (SEE SPECIFICATION OF ERROR, NO. 6, THIS BRIEF, PAGE 14, AND SEE STATEMENT OF QUESTION NO. 2, PETITION FOR CERTIORARI, PAGE 5.)

The specification of error to which this argument corresponds is an involved part of the question argued herein as Point B, supra, p. 33. As appears in the majority opinion of the Circuit Court of Appeals, the majority regarded the 2499 shares in question as having revested in the corporation by the retransfer from George A. Barceloux to the corporation (R. 474). The Court says:

> "That stock was accepted by the corporation and the note given as the purchase price thereof was cancelled. The stock certificate was offered in evidence and deposited with the Court. The testimony showed that it [stock certificate?] had been transferred to the corporation, and all the other stock sold at the pledgor's sale was also returned to the corporation."

The Circuit Court of Appeals (majority opinion) is in error in stating that the stock certificate was offered in evidence and deposited with the Court. The record shows that Certificate No. 5 of Peter Barceloux Company, originally issued to Henry J. Barceloux, cancelled and attached to the stub in the stock book, was in evidence, and Certificate No. 12, reissued by the Peter Barceloux Company to itself as pledgee,

and also subsequently cancelled and attached to the stub in the stock book, was in evidence (R. 302, Plaintiff's Exhibit No. 3, the stock book). This exhibit was placed in evidence by plaintiff (petitioner here) as part of his proof of fraud in the pledges. Certificates No. 5 and No. 12 appear on the face of them to have been cancelled. The stock book (R. 302, Plaintiff's Exhibit No. 3) shows that other certificates have been issued in lieu of Certificate No. 12 and are outstanding. These outstanding certificates were not introduced in evidence. The record contains no evidence who owned or held them during all the intervening time between August 16, 1926, soon after which Peter Barceloux Company sold these shares to George A. Barceloux (admitted by answer, paragraph IX, R. 26), and May 11, 1930, on which day the corporation took them back from George A. Barceloux (R. 419). The certificate held by George A. Barceloux during the interval, being transferable by endorsement, it cannot be presumed on this record who now owns the shares, and it thus appears that there is no predicate in the record and the proofs therein for any claim that the shares, much less the certificate evidencing them, have been tendered into the Circuit Court of Appeals or into the District Court.

It has long been the law of California that it is the shares of stock in a corporation which constitute property belonging to the shareholder, and that such property is not a property of a possessory nature but an intangible property.

Payne v. Elliot, 54 Cal. 339, 340.

This property in the shares is "usually evidenced by certificates of stock."

Burke v. Badlam, 57 Cal. 594, middle of page 601.

These certificates are not the shares, but evidence of them, so that the courts of California have power to determine and adjudge the ownership of the shares to be in some other person than the possessor of the certificates, as was done in *Jean v. Jean,* 207 Cal. 115, 120, 122. (This also was a family corporation in which the family interests were evidenced by shares in a corporation formed to hold the family property, and the parties to the case were litigating members of the family.)

Hence it cannot be assumed upon the record in this case what may be the rights of the various members of the Barceloux family among themselves with respect to the 2499 shares which originally were owned by Henry J. Barceloux; and it cannot be contended that the full question of ownership in those shares has been subjected to the jurisdiction of the Circuit Court of Appeals in this case; the record shows that there are no members of the Barceloux family who are made individual parties to this suit.

G.

THE SALE BY THE CORPORATION OF THE STOCK ACQUIRED AT A PLEDGE SALE HELD INVALID CONSTITUTED A CONVERSION AND THEREFORE THE MONEY JUDGMENT WAS PROPER AND SHOULD HAVE BEEN AFFIRMED FOR THAT REASON. (SEE SPECIFICATION OF ERROR NO. 7, THIS BRIEF, PAGE 14, AND STATEMENT OF QUESTION INVOLVED NO 6, PETITION FOR CERTIORARI, PAGE 6.)

Under the decision of the Circuit Court of Appeals that the Peter Barceloux Company's sale under the pledge was invalid, it follows that such corporation continued to hold those shares under the pledge and that it converted them to its own use when, a few days later, it sold an unrestricted ownership in those shares to George A. Barceloux. For this reason the money decree of the District Court was right and should be affirmed.

That part of the majority opinion of the Circuit Court of Appeals which concludes that the pledge sale by the Peter Barceloux Company was invalid (R. 473) goes on to say that the conduct of the corporation (respondent here) in making that sale without notice as agreed "does not appeal to the conscience of the chancellor and if consistent with the applicable principles of law the Trustee should be relieved from the forfeiture of the equity in the stock so sold." This tacitly recognizes that the Trustee in bankruptcy of Henry J. Barceloux had an equity in the shares of stock while the pledge continued, from the forfeiture of which equity by an invalid pledge sale the Trustee should be relieved. The equity which the Trustee had in that situation was the right of Henry Joseph Barceloux to have redeemed those shares from a pledge which continued to subsist.

While a pledge subsists as between the pledgor and the pledgee, the real ownership of the pledge remains in the pledgor under the law of California.

People v. Robinson, 107 Cal. App. 211, bottom of page 220.

Thus it is that if the pledge sale was invalid the general property in the pledged shares vested by force of Bankruptcy Act, Section 70 (a) (5) in the Trustee (plaintiff below), and conversion accomplished by selling to George A. Barceloux also vested in the Trustee a right of action under said Section 70 (a) (6); and since this suit was rightly begun in equity upon the facts pleaded in the bill and admitted by the answer, the supposed conversion developing for the first time as a technical legal consequence of the holding of the Circuit Court of Appeals supports the judgment of the trial Court, which was for the value of the shares so sold and transferred. Had the question thus arisen incidentally in a case rightly begun in equity, the trial Court would have decided the incidental legal question according to New Equity Rule 23; and, so decided, the Circuit Court of Appeals should have affirmed agreeable to principles laid down in:

Twist v. Prairie Oil & Gas Co., 274 U. S. 684;
American Mills Co. v. American Surety Co., 260 U. S. 360.

The Circuit Court of Appeals states in the majority opinion (R. 473) that:

> "There is a divergence of views among the members of the court as to the consequences which should flow from the manner and method of the sale."

It is believed that the foregoing citations of California ~~statutes~~ decisions and of the Bankruptcy Act clearly show what consequences should flow from the manner and method of the sale. At any rate, the consequences of an invalid pledge sale, and the subsequent exercise of acts of absolute ownership by the pledgee, would under the decisions of the courts of California constitute a repudiation of the pledge, if there was one.

Lowe v. Ozmun, 3 Cal. App. 387, 394 (identical facts);
Bell v. Bank of California, 153 Cal. 234, 238;
Henning v. Akin, 91 Cal. App. 246, 255, 256.

The general law of pledges is recognized by Federal courts to be the same.

Dibert v. Wernicke, 214 Fed. 672, 682, 683 (C. C. A. 6th, identical facts);
Feilbach Co. v. Russell, 233 Fed. 412, 415 (C. C. A. 6th).

The attempted retransfer of the shares by George Barceloux to the defendant corporation did not cure the conversion or absolve the corporation from liability for the money value of the converted property.

Henning v. Akin, 91 Cal. App. 246, at 255.

The value at that time having been found by the Court below (R. 61), the record thus afforded everything necessary to affirm the judgment instead of reversing it, and it should have been affirmed.

Johnson v. Peoples State Bank, 22 Fed. (2d) 211, at 213.

Furthermore, with respect to certain shares of stock other than the 2499 shares and covered by the same pledge, the defendant corporation, after receiving them back from George A. Barceloux, sold them again to others (R. 182, 189, 190) and never regained possession, and the decision of the Circuit Court of Appeals upon rehearing recognized the binding effect of that sale by allowing a credit equal to the found value at the time of the conversion (R. 507).

H.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IGNORED AND DID NOT OVERCOME THE TRIAL COURT'S FINDING THAT THE PLEDGE OF APRIL 27, 1926, WAS VOID AS TO CREDITORS FOR WANT OF IMMEDIATE DELIVERY AND A CONTINUED CHANGE OF POSSESSION AS REQUIRED BY SECTION 3440 OF THE CIVIL CODE OF THE STATE OF CALIFORNIA. (SEE SPECIFICATION OF ERROR, NO. 8, THIS BRIEF, p. 14, AND SEE STATEMENT OF QUESTION NO. 7, PETITION FOR CERTIORARI, p. 6.)

The trial Court found that the pledge evidenced by the written pledge agreement dated April 27, 1926, was void under Section 3440* of the Civil Code of the State of California for the want of delivery and the continuous change of possession of the certificate representing said shares (R. 34). This question was not passed upon by the Circuit Court of Appeals. In the majority opinion (R. 470) it is stated that the opinion of the trial Court indicates that it was of the opinion that the antecedent pledge was void for the lack of delivery by the bankrupt to the company.

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*See section in full in appendix.

The "antecedent pledge" referred to the contention of the respondent that Henry had pledged his said certificate covering his 2499 shares of the respondent company's stock to the company by an oral agreement with his father in 1917 or 1918, which is claimed to have been renewed by the written pledge agreement dated April 27, 1926. This contention was raised at the trial for the purpose of defeating the legal effect of the lack of delivery under the written pledge agreement dated April 27, 1926. The Circuit Court of Appeals misconstrued the trial Court's findings in this regard, in that the trial Court found that the pledge of the 2499 shares to respondent "was void for that the pledged certificate and *any writing of pledge* until said time were in his possession" (see bottom of R. 33 and top of R. 34), and the record shows without conflict that the only "writing of pledge" that respondent ever had was the agreement dated April 27, 1926 (R. 337, 350). Such finding necessarily carries the implication that the trial Court disbelieved Henry's testimony as to the existence of a "preexisting pledge."

In support of its said contention the respondent relies solely upon the testimony of Henry Barceloux, which testimony is completely impeached by the documentary proof, as is shown by the following.

Henry testified that he gave the respondent his stock as collateral to secure his then existing indebtedness and all future advances under an oral agreement with his father, who was then manager of the corporation, and that this was done in 1917 or 1918 (R. 346, 348). He was not certain whether he de-

livered the certificate to his father or to his brother-in-law, who was then acting as assistant secretary, but he was emphatic that the oral understanding was had only with his father (R. 346, 348). The security was given to secure moneys that he had then borrowed on open account, which was later evidenced by a promissory note in the sum of $24,000.00, which the bankrupt emphatically stated was accumulated between the years 1917 and 1918 (R. 348). The bankrupt's father died in December, 1918 (R. 378). The said testimony is entirely dispelled by the documentary proof introduced in evidence. The ledger sheet of the respondent entitled "H. J. Barceloux," showing the open account withdrawals of the bankrupt, which was introduced in evidence as Defendant's Exhibit No. 7 (R. 326), shows that in the years 1920, 1921 and 1922, the corporation was the debtor of H. J. Barceloux, owing him for salary the following amounts in the respective years: $230.00, $1035.00, and $460.00, or, on December 31, 1922, the total sum of $1725.00. Further, a debit balance in favor of the corporation does not appear in said account until June 28, 1923. The bankrupt continued his borrowings during the years 1924 and 1925, and in the latter year the promissory note for the sum of $24,000.00, evidencing all of said borrowings, was taken. Therefore, if he pledged his stock by an oral agreement with his father to secure these advances, it was not done in 1917 or 1918, and could not have been done until there was a debit balance, to-wit, in 1923, and at that time his father was dead. This stamps his testimony as false.

Further, there were no promissory notes shown by the books of the respondent company owing by the bankrupt to the company until April 27, 1922 (misstated in Record as February 27, 1922, R. 327), which is the date of the note in the sum of $2,000.00. George Barceloux admitted that the corporation had no security in 1919 (R. 298), and security was first given in "1921 or 1922, somewheres around there" (R. 298). The bankrupt was emphatic that the only pledge that he gave prior to the pledge dated April 27, 1926, was by agreement with his father to secure debts which were finally evidenced by the $24,000.00 note, and therefore there could have been no pledge executed in 1921.

Since the said entries on the respondent's ledger sheets were made in due course of business and a long time prior to and free from this sequence of events that placed all of the properties of the bankrupt beyond the reach of his non-kindred creditors, said documentary proof conclusively established the truth and stamped the testimony of the bankrupt as false, and further emphasized the rashness and improbability of the bankrupt's testimony.

Further, in the event that any weight is given to the bankrupt's testimony, then and in that event the documentary proof shows that such indebtednesses so secured were paid off prior to 1923, and the pledge, if any, so terminated.

Since the majority opinion of the Circuit Court of Appeals stated that the pledge of April 27, 1926, was, as to Freeman, a preference (R. 467), it necessarily found that no pledge existed prior thereto, for if such

prior pledge then existed, the latter transaction would not have been a preference, but a renewal of such purported preexisting pledge.

Having demonstrated that there was no preexisting pledge and Henry having the possession of the certificate representing his shares in the respondent corporation at the time of the purported execution of the pledge agreement dated April 27, 1926, no valid pledge could then have been created except by delivery of his certificate to the pledgee. See:

McFall v. Buckeye etc. Assn., 122 Cal. 468, 470;

Harvey v. Stowe, 219 Fed. 17, 22 (C. C. A. 9th);

Casey v. Cavaroc, 96 U. S. 467, 486.

Since Henry brought with him to said meeting his said certificate, and after the meeting retained the same in his possession, together with the purported written pledge agreement, until July 28, 1926, said purported pledge agreement was conclusively presumed to be fraudulent and void as to all those who were his creditors while he so remained in possession, of whom the trial Court found there were many (Section 3440,* Civil Code of the State of California).

The provisions of Section 2988 of the Civil Code of the State of California provide that the lien of a pledge is dependent on possession, and no pledge is valid until the property transferred is delivered to the pledgee, or to a pledge holder.

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*See section set forth in full in appendix.

Section 2993* of the Civil Code of the State of California provides that the pledge holder must be some third party, and that the pledgor cannot act as a pledge holder.

Further, the provisions of Section 3440* of the Civil Code of the State of California are applicable to a pledge of corporate stock, and it provides that for such pledge to be valid as against creditors of the pledgor, it must be accompanied by immediate delivery of the certificate and followed by an actual and a continued change of possession thereof.

See:

McFall v. Buckeye etc. Assn., 122 Cal. 468, 470,

and

Harvey v. Stowe, 219 Fed. 17, 22, a decision of the Ninth Circuit Court of Appeals based upon California statutes and law.

This Court, in construing like statutes of other states, has also so held.

See:

Casey v. Cavaroc, 96 U. S. 467, 486;
Christian v. Atlantic & N. C. R. R. Co., 133 U. S. 233, 241.

If the decision of the Circuit Court of Appeals be construed to reverse the finding of the trial Court in this regard, it is in direct conflict with *Casey v. Cavaroc,* 96 U. S. 467, in which case (like the case at bar) the president of the pledgor endeavored to consummate a pledge by the delivery of the securities to

*See sections set forth in full in appendix.

himself, as agent of the pledgee, and this Court held that such pledge was invalid as to creditors for the want of legal delivery.

I.

THE TRIAL COURT'S FINDINGS OF FACT SHOULD NOT BE REVERSED ON APPEAL WHEN BASED UPON THE TESTIMONY OF WITNESSES HEARD AND OBSERVED BY THE TRIAL JUDGE, AND ALSO BASED ON WRITTEN EVIDENCE CONSISTENT WITH HIS FINDINGS AND INCONSISTENT WITH CONTRARY FINDINGS. (SEE SPECIFICATION OF ERROR NO, 9, THIS BRIEF, PAGE 15, AND SEE STATEMENT OF QUESTION NO. 8, PETITION FOR CERTIORARI, PAGE 6.)

The majority opinion of the Circuit Court of Appeals is not clear as to

(a) Whether it found no actual fraud in the pledge purported to be evidenced by the written pledge of the date of April 27, 1926, and the subsequent pledge in July, 1926, of additional securities [although it is stated in said opinion, "We hold that the pledge was valid" (R. 482)]; or

(b) Whether said Court concurred with the trial Court's finding of actual fraud and then sought to avoid the legal effect thereof [by reason that creditor Freeman was estopped to question the validity of the pledge to the respondent company (R. 470, 472)]; or

(c) Whether it found fraud as to other creditors, but held it immaterial because of a supposed lack of pleading and/or proof that there were other creditors existing at the time of said transfers (R. 472, 473).

Because of the aforementioned uncertainty as to whether the Circuit Court of Appeals really found

the facts of fraud contrary to the trial Court's findings, it is necessary to present this branch of the argument as an alternative to the hypothesis that the findings below stood with different conclusions of law drawn from them. If the Circuit Court of Appeals by its majority opinion found fraud, and thereby concurred with the findings of the trial Court, then all of the above are conclusions of law as to the legal effect of the fraud and should be argued as errors of law, and are fully covered herein by the specifications Nos. 4 and 8; but if the majority opinion of the Circuit Court of Appeals found no fraud at all, that is, that the pledges were bona fide, or found that they were lawful preferences, then its conclusions are not supported by the facts and the trial Court's finding of fact on fraud should not be reversed, particularly when such findings are based upon testimony of the bankrupt and the respondent's officers heard and observed and disbelieved by the trial Judge.

The trial Court found that all the transfers involved were made with intent by all parties to hinder, delay and defeat Henry's creditors. The Circuit Court of Appeals erred in reversing such finding (if it did so) by its holding that the pledge bearing the date of April 27, 1926, and the subsequent pledge of additional securities in July, 1926, were valid (R. 482) and at the most constituted preferences in favor of respondent, made with the intent of the respondent and the bankrupt merely to prefer the respondent to other creditors without any intention to hinder, delay or defraud said other creditors (R. 467).

Section 3432* of the Civil Code of the State of California recognizes the validity of a bona fide preference, but Section 3431 of the Civil Code provides:

> "*In the absence of fraud* every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such contract" (italics ours).

The Appellate Courts of the State of California, based upon said section, have definitely held that if the intention of the parties in effecting a preference is not merely to secure to a favored creditor payment of his claim but to help the debtor cover up his property and to keep other creditors from seizing it, or in any other way to hinder, delay or defraud any other creditors, the preference is fraudulent and void and the favored creditor cannot avoid this consequence by showing that he parted with actual value for the conveyance.

See:

Roberts v. Burr, 135 Cal. 156;
In re Muller, 118 Cal. 432;
In re Luce, 83 Cal. 303;
Wolbrecht v. French, 24 Cal. App. 505;
12 *California Jurisprudence,* 1012.

Such creditor receiving the preference must take only enough property to satisfy his debt. In order to sustain a conveyance of a greater amount of property than is necessary to satisfy the demands of the creditor receiving preference, it must be made to

*See section set forth in full in appendix.

appear that the property is of such a nature as to make its severance or division impracticable, or that the debtor intends in good faith to use the proceeds derived therefrom in satisfaction of debts owing to other creditors.

Wolbrecht v. French, 24 Cal. App. 505, at 508;
Becker v. Beldt, 205 Cal. 491, at 494.

This Court has clearly recognized the difference between a preference and a fraudulent conveyance and has held that both may exist under the same set of facts, and further, that if in effecting a preference an actual intent to defraud, hinder or delay other creditors of the bankrupt is present, the same is void as a fraudulent conveyance.

See:

Van Iderstine v. National Discount Co., 227 U. S. 575, 582;
Dean v. Davis, 242 U. S. 438, 444;
Coder v. Arts, 213 U. S. 242, 243, 244.

The trial Court's findings were:

"Moreover, taking into account all the facts and circumstances in evidence, *all that makes for credibility of witnesses and weight to be given to evidence, all the indefinables impressions of the trial, the conviction is compelled that the transfers involved were made with intent by all to hinder, delay and defeat Henry's creditors.* * * * Their more or less contradictory testimony to their own innocency, fails to persuade to outweigh all that gives that sinister aspect to their actions which establish their intent not only to acquire Henry's properties, to satisfy their claims, perhaps to protect him also, but also to foil efforts of his unsecured creditors

to make their claims out of his properties" (R. 34, 35) (italics ours).

The trial Court heard and observed the witnesses (the bankrupt and the officers of the respondent company) and said the evidence and all of the "indefinables impressions of the trial" compelled the conviction that the transfers were made with intent by all parties to hinder, delay and defeat Henry's creditors. This case in this respect is identical with the case of *Davis v. Gates,* 235 Fed. 192, where the Court, on page 199, said:

> "As witnesses the bankrupt and the defendant do not commend themselves to this Court. Their testimony discloses such evasiveness, rashness of statement and inconsistencies and improbabilities as not only to deprive it of weight but strongly to tend to establish the plaintiff's case, even in the absence of opposing evidence."

Likewise, in *Becker v. Beldt,* 205 Cal. 491, in which case the plaintiff sought to have decreed that a preference was made with actual intent to hinder, delay and defraud creditors, and in finding said fraudulent intent the Court in part said, at page 494:

> "As a whole her (referring to the transferee) testimony was evasive and from it the court was justified in concluding in effect that not only did she have knowledge of the fraudulent intent of her brother in making the conveyance to her but that she participated in the carrying out of that fraud by arranging to take the title out of the reach of plaintiffs and give back to her brother a sum of money greater than the amount of the indebtedness found to be owing by him to her."

There is no conflict in the facts or the sequence of the various transactions between the bankrupt and the respondent company, but the only conflict, if any, is in the inferences that may be deduced from these facts. The trial Court in its opinion expressly stated that the "conviction" or inference was compelled "that the transfers involved were made with intent by all parties to hinder, delay and defeat Henry's creditors" after considering not only the facts and circumstances in evidence, but also "all that makes for credibility of witnesses" (the demeanor and conduct of witnesses) and the "weight to be given to evidence" and all the "indefinables impressions of the trial."

The Circuit Court of Appeals did not hear and observe the witnesses, nor were there before it these "indefinables impressions of the trial," and under these circumstances said Court should (as it has repeatedly done heretofore, see cases below) not have been inclined to disturb lightly the findings of the lower Court.

Jones v. Jones, 35 Fed. (2d) 943, 945;
John T. Porter Co., et al. v. Java Cocoanut Oil Co. Ltd., 4 Fed. (2d) 476, 478; certiorari denied, 268 U. S. 697-698;
Ostbern v. Dean, 18 Fed. (2d) 1019, 1020;
Monson v. Hibler, 24 Fed. (2d) 909, 910.

These cases are cited in the dissenting opinion by Circuit Judge Sawtelle (R. 493).

The foregoing may be concluded by referring to the very expressive statement of Judge Sawtelle in his dissenting opinion, to-wit:

> "Such 'indefinable impressions of the trial' are indeed the persuasive imponderables of an equity suit involving fraud" (R. 492).

The mere statement of the facts concerning the events and their sequence is in itself sufficient to affirm the lower Court's findings of intent to defraud, which was clearly expressed by Judge Sawtelle in the dissenting opinion in the following language:

> "The sequence of events * * * clearly discloses a plan to 'freeze out' non-kindred creditors from the family corporation's stock and from other of Henry's assets" (R. 488).

Said statement compels conviction when considered with the fact that by "the sequence of events" all of the bankrupt's property of a value of $180,000.00 was at the date of his adjudication as a bankrupt transferred to and held by the respondent and members of Henry's family, with nothing remaining in the bankrupt's estate with which to satisfy the large amount of his indebtednesses held by his non-kindred creditors.

Positive and direct proof of an intent to hinder, delay or defraud creditors can seldom be obtained, for generally the first effort of a man who intends to commit a fraud is to throw a veil over the transaction, to shield it against assault and baffle all attempts at detection. No man willingly furnishes the evidence of his own turpitude. Fraud is, for this reason, rarely perpetrated openly and in broad daylight. It is committed secretly and privately, and is usually hedged in and surrounded by all the guards which can be invoked to prevent discovery and ex-

posure. Its operations are frequently circuitous and difficult of detection. It is therefore usually established by circumstantial evidence.

Bump on Fraudulent Conveyances, Section 612, page 590.

The following quotation from *Bump on Fraudulent Conveyances,* Section 613, page 591, is a clear statement of the method and quantum of proof required in fraudulent conveyance cases of the intent to defraud, to-wit:

"No transfer is fraudulent unless it is made with an intent to delay, hinder or defraud creditors, and this intent is an emotion of the mind, and can usually be shown only by the acts and declarations of the party. These acts and declarations, and all the concomitant circumstances, must be established, and then the motive may be deduced from them in accordance with those principles which are shown by experience and observation to rule human conduct. The proof in each case will consequently depend upon its own circumstances. It usually consists of many items of evidence which, standing detached alone, would be immaterial, but which, in connection with others, tend to illustrate and shed light upon the character of the transaction and show the position in which the parties stand, and their motives, conduct and relations to each other. *Quae singula non prosunt, juncta juvant.* Although the evidence is generally circumstantial it is often as potent as direct testimony. Sometimes a combination of circumstances characterizes a transaction so plainly and so clearly as to stamp upon it unerring and indelible marks of fraud which can not be mistaken, and the

> transaction itself present phases so remarkable and peculiar that no fair-minded person can hesitate to pronounce it fraudulent. The *indicia* are often the clearest proof and quite as reliable as positive evidence."

It was not necessary to find an actual fraudulent intent. A hindrance by intent but with no fraudulent intent is in principle the same as was found in the most recent reported decision of this Court.

> *Shapiro v. Wilgus,* .. U. S. ..., decided December 5, 1932, No. 40, October Term, 1932.

The fraud presented in this late case was constructive, not actual, consisting in the hindrance of creditors from reaching the debtor's property by the ordinary legal processes. As this Court said, the law stamps a quality upon the act without regard to actual intent to defraud under such circumstances. The analogy between a receivership to ward off executions by creditors and an excessive pledge followed by a surreptitious pledge sale to accomplish that effect is close. In the case at bar pledge was confessedly given because Freeman was pressing and the Barceloux family "made" Henry "give us on April 27, 1926," the pledge agreement; "we just wanted it more explicit," knowing that "there had been a judgment" in favor of Frank Freeman (R. 303). Then very shortly they "wanted" and by agreement Henry gave them "more security," the July pledge of the bank, garage and insurance shares (R. 310). Thereafter no property was left open to execution. Whether or not fraud was intended, hindrance was the result of all these transactions done with knowl-

edge. The case is thus one of constructive fraud within the principles of

Shapiro v. Wilgus, ... U. S. ..., No. 40, October Term, 1932.

And the finding of these facts, inescapable, necessitates the legal conclusion of a conveyance obnoxious to the law. The trial Court's findings and conclusions are supportable on that view.

Irrespective of the "indefinable impressions of the trial," which the trial Court concluded "suffices to condemn," the following circumstances or badges of fraud shown without conflict were disregarded:

1. **Relationship of the parties.**

The respondent, a family corporation, was dominated during the year 1926 by George Barceloux and Cora Gelinas, brother and sister of the bankrupt, and by Henry Barceloux, and for all purposes the corporation may be treated as the Barceloux family. Under local and national law the relationship of the parties subjects the whole transaction to rigid scrutiny, and that fact, when considered with other facts, may be sufficient to condemn.

Evans v. Sparks, 170 Cal. 532, 534;
Davis v. Schwarz, 155 U. S. 631, 638.

Since the bankrupt, being insolvent or in contemplation of insolvency, conveyed his only substantial unencumbered asset to the Barceloux family, the effect of which was to place such property beyond the reach of his creditors, the onus shifted to the respondent to show by satisfactory evidence that the conveyance was based upon a valuable consideration,

free from any fraudulent intention on the part of the debtor, known to or participated in by the respondent, to hinder, delay and defraud his creditors.

Hedrick v. Hockfield, 283 Fed. 574.

This burden the respondent has failed to sustain. On the contrary, the proof supported the findings of the trial Court and of Judge Sawtelle to the effect that the "sequence of events" discloses a plan to "freeze out" non-kindred creditors.

2. That the pledge covered greatly excessive security over and above all indebtedness.

The respondent and bankrupt attempted to consummate a preference by pledging to the respondent securities found by the master to be of the value of $94,949.66, as of August 16, 1926 (R. 61), as security for the three notes set forth in the pledge agreement totalling the sum of $27,814.48, and further, in July, 1926, taking as additional security therefor securities valued by the master at $2,158.00, as of August 16, 1926, when they already claimed security of three times the value of the three notes secured by the pledge (R. 492-493).

Under the local law the conveyance of a greater amount of property than is necessary to satisfy the demand of the creditors receiving the preference is a badge of fraud.

Sukeforth v. Lord, 87 Cal. 399;
Wolbrecht v. French, 24 Cal. App. 505;
Becker v. Beldt, 205 Cal. 491, at 494.

The fact that the transaction was by way of pledge rather than by sale is entirely immaterial, as pointed

out in *Turner v. Jacobs*, 15 F. (2d) 350, at 352 (C. C. A. 5th), and particularly when it may be inferred, as in the case at bar, that the pledgee then contemplated the sale of said securities under a pledge sale which enabled the one creditor to get property worth substantially more than his debt and thereby placed beyond the reach of the other creditors the debtor's only asset of substantial value, which, but for that pledge, could be subjected to the payment of the debts owing to them.

3. Insolvency.

The trial Court found (R. 31) that at the time in question the bankrupt's property was of the value of some $180,000.00, the indebtedness amounting to some $191,000.00, which finding is indisputably supported by proof. In any event the bankrupt at the time in question was insolvent within the meaning of Section 3450 of the Civil Code, which provides:

> "A debtor is insolvent, within the meaning of this title, when he is unable to pay his debts from his own means, as they become due."

4. The taking of additional security when the creditor already holds excessive security.

As heretofore stated, in July, 1926, when the respondent held security of a value of three times the claimed indebtedness, it took additional security for the same indebtedness, having a value of $2,158.00.

The law abhors the practice of one creditor already having excess security piling security upon security, thereby defeating the payment of the just demands

of the debtor's other creditors and, therefore, holds the same to be a badge of fraud.

Jaffray v. Wolf, 4 Okl. 303.

5. Selling securities for indebtedness not secured by the pledge.

(a) The respondent noticed the sale of the securities claimed to be held by it for payment of indebtedness found not to be owing to it, to-wit, an open account for $1,800.00, with interest thereon in the sum of $830.00. Said claim was not due or owing to the respondent but to the heirs of Peter Barceloux, as found by the majority opinion (R. 471).

(b) Respondent also noticed the sale for the payment of interest on an open account in the sum of $1,717.62, when said amount did not bear interest. The law of the State of California is that the balance on an open book account does not bear interest unless there is an express agreement between the parties that the debtor shall pay interest thereon, or unless such agreement be implied from the practice of the parties.

Atkinson v. Golden Gate Tile Co., 21 Cal. App. 168, 172;

Fee v. McPhee Co., 31 Cal. App. 298, 314.

The testimony of George A. Barceloux negatives any agreement to pay interest, in that he testified as follows:

> "A. Well, I figured the date where he first agreed that he owed that money and had not turned back was the date that he should be charged interest, *and if he did not want to pay it he could object to it at the sale"* (R. 320) (italics ours).

(c) The pledge agreement was given to secure three promissory notes. The notice of sale contained in addition to the notes set forth in the pledge agreement, three additional claimed obligations, that is,

½ of a promissory note in the sum of $2,000.00 signed by H. J. Barceloux and George A. Barceloux, dated January 3, 1923, with interest thereon	$1,276.00
Open account of $1,717.62, with interest thereon at $304.18	2,021.80
Open account for $1,800.00 with interest thereon in the sum of $830.00	2,630.00
Making a total of the additional obligations in the sum of	$5,927.80

The pledge agreement provided that upon a sale to satisfy its specific debts, any surplus proceeds could be appropriated to any other debt due the pledgee from Henry. The trial Court found that "payment from surplus, and payment by sale, are quite different." In the latter case it is sale of a pledge for debts other than for which the pledge was made and the transaction is void (R. 34).

Such an agreement to pay from surplus contained in a pledge agreement has been held merely to refer to obligations accruing in the future and not then existing.

Franklin Bank v. Harris, 77 Ind. 423.

(d) The foreclosure of the pledge was further invalid for the reason that although assumed to have been made at public sale, no outcry was given, no bids invited (R. 323), but said stock together with

that of the second pledge was quietly appropriated to the respondent as purchaser thereof for the amount purported due it, and all of which was done after Freeman as the holder of the second pledge had demanded notice of any such sale.

(e) Further, the respondent offered the stocks of four different corporations held by it under the purported pledge agreement *en masse* for the satisfaction of the total indebtedness claimed to be due to it by the bankrupt, which is in violation of Section 694* of the Code of Civil Procedure of the State of California.

See, also:

Barr v. Smith, 97 Cal. App. 398.

6. Secret trusts.

Fraud is generally accompanied by a secret trust and since the debtor must usually select a person in whom he can repose a secret confidence, and the sentiment of affection commonly generates this confidence, it often causes relatives to deal with each other to the detriment of just creditors. When as between members of a family a member will take security in the sum of $97,107.66 belonging to another member to satisfy an obligation in the sum of $27,814.48, necessarily an inference must be deduced that there is some agreement between them that all of the property or a portion thereof will be returned to the debtor when his financial troubles are over and after he has been discharged as a bankrupt. This is

*See section in full in appendix.

more pertinent in the case at bar in that all of the bankrupt's properties of a value of $180,000.00 were transferred to his family, leaving nothing from which the non-kindred creditors could satisfy their obligations.

In view of the circumstances and badges of fraud revealed from the testimony of the transferor and transferee of these fraudulent transactions, the Circuit Court of Appeals erred in disturbing the trial Court's finding on fraud, and especially so when said Appellate Court did not have the advantage of hearing and observing the witnesses and those things "that makes for credibility of witnesses," and when these intangibles, or, as expressed by the trial Court, "the indefinable impressions" which in themselves in the trial Court's opinion sufficed to condemn the transactions.

In an equity appeal the findings of fact are not beyond review to the same degree as on appeals at law. Nevertheless, in an equity appeal such findings are not to be disturbed lightly or unless clearly wrong and manifestly erroneous, as already stated.

Another applicable rule is that a master's findings approved by the trial Court are treated as prima facie correct and will not be set aside unless clearly wrong.

Barger v. National Discount Corp., 33 F. (2d) 511;

Schock v. Malloy, 26 F. (2d) 621, 623 (citing many cases).

It is only when a very strong appearance of error in findings exists in the record that the reviewing

Court will overturn the trial Court's findings, such a case, for example, as

Harkin v. Brundage, 276 U. S. 36, 53,

in which Chief Justice Taft, for this Court, set aside the findings below.

No such manifest error appears by the record here. It cannot be said that the trial Court's findings of fraud were baseless inferences and manifestly erroneous, even if the Circuit Court of Appeals as a trial Court might have drawn other inferences. Moreover, in one particular the referee and the trial Court concurred in finding the value of the transferred shares to be a sum more than three times as great as the debt claimed by the transferee, respondent here. That value as found by the referee was excepted to on the incoming of his report (R. 65 to 82) and was confirmed (R. 103) in that respect. This unconscionable disparity between the claim of debt and the proved value, doubly found, should not lightly be disregarded.

CONCLUSION.

It is therefore respectfully submitted that this Court should reverse the decision of the Circuit Court of Appeals and that the cause, upon such reversal being made, should be remanded direct to the District Court, in accordance with U. S. Code, Title 28, Section 877 (Act of March 3, 1891, c. 517, Sec. 10), affirming the judgment of the District Court, as was done in *Delk v. St. Louis & S. F. R. Co.*, 220 U. S. 850.

Dated, San Francisco, California,
February 10, 1933.

ROBT. T. DEVLIN,
WM. H. DEVLIN,
Solicitors for Petitioner.

ARTHUR C. DEVLIN,
A. I. DIEPENBROCK,
HORACE B. WULFF,
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GEORGE F. LONGSDORF,
Of Counsel.

(Appendix Follows.)

Appendix

California Civil Code, Section 3439:

"Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

California Civil Code, Section 3440, first paragraph:

"Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer."

California Civil Code, Section 309, as it stood in 1926:

"Unless they shall have been first permitted or authorized so to do by the commissioner of corporations, directors of corporations must not make dividends except from the surplus profits arising from the business thereof; nor must they create any debts beyond their subscribed capital stock; *nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock, except as hereinafter provided, nor reduce or increase the capital stock,* except as provided in section three hundred fifty-nine of this code. For a violation of the provisions of this section, the directors under whose administration the same may have happened (except those who may have caused their dissent therefrom to be entered at large on the minutes of the directors at the time, or were not present when the same did happen) are, in their individual or private capacity, jointly and severally liable to the corporation, and to the creditors thereof, to the full amount of the capital stock so divided, withdrawn, paid out, or reduced or debt contracted. Nothing herein prohibits a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution, or the expiration of its term of existence" (italics ours).

California Civil Code, Section 342 (enacted 1931):

"No corporation shall purchase or agree to purchase, or cause or permit any corporation which it controls to purchase or agree to purchase, or employ or assist any person or corporation to purchase or agree to purchase for its account any of its shares except as follows:

(1) *To collect or compromise in good faith, a debt,* claim or controversy with any shareholder;

(2) *From shareholders who by reason of dissent* are entitled to be paid the fair cash value of their shares;

(3) *From one who as an employee other than as an officer* or director has purchased such shares from the corporation under an agreement reserving to the corporation the option to repurchase or obligating it to repurchase;

(4) *To eliminate fractional shares;*

(5) *To purchase shares subject to redemption* at prices not exceeding the redemption price thereof;

(6) *To carry out provisions of its articles authorizing conversion* of its shares; and

(7) *Subject to limitations, if any, contained in its articles,* only from earned surplus.

A corporation shall not purchase its own shares of any class in any case when there is reasonable ground for believing that the corporation is unable, or, by such purchase, will be rendered un-

able, to satisfy its debts and liabilities when they fall due. Nothing in this section shall be construed to prevent a corporation from acquiring its own shares by gift or bequest or upon a merger with or distribution of the assets of another corporation (added by Stats. 1931, p. 1800)."

California Civil Code, Section 2993:

"A pledgor and pledgee may agree upon a third person with whom to deposit the property pledged, who, if he accepts the deposit, is called a pledge-holder."

California Civil Code, Section 2988:

"The lien of a pledge is dependent on possession, and no pledge is valid until the property pledged is delivered to the pledgee, or to a pledge-holder, as hereafter prescribed."

California Civil Code, Section 3432:

"A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another."

California Code of Civil Procedure, Section 694:

"All sales of property under execution* must be made at auction, to the highest bidder, between the hours of nine in the morning and five in the

*(Note. Made applicable to pledge sales by California Civil Code, Section 3005: "The sale by pledgee, of property pledged, must be made by public auction, in the manner and upon the notice of sale of personal property under execution.")

afternoon. *After sufficient property has been sold to satisfy the execution, no more can be sold.* Neither the officer holding the execution nor his deputy can become a purchaser or be interested in any purchase, at such sale. When the sale is of personal property, capable of manual delivery, it must be within view of those who attend the sale, *and be sold in such parcels as are likely to bring the highest price;* [portion relating to sales of real property omitted]. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the sheriff must follow such directions" (italics ours).

Due service and receipt of a copy of the within is hereby admitted

this.....day of February, 1933.

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Solicitors for Respondent.

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MAR 23 1933
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 564

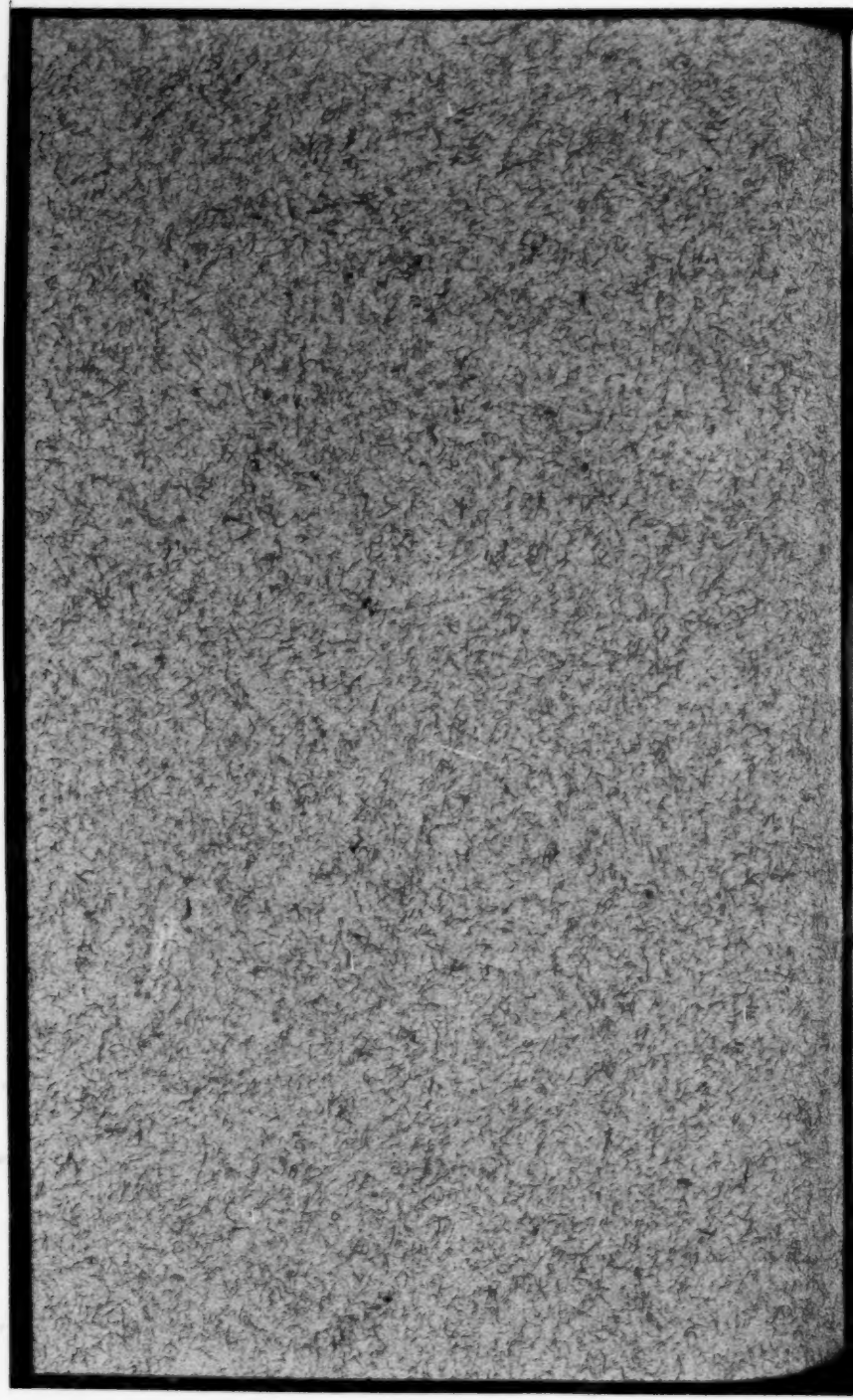
F. E. BUFFUM, as Trustee in Bankruptcy of Henry Joseph Barceloux, Bankrupt, Petitioner,

vs.

PETER BARCELOUX COMPANY.

MEMORANDUM SUPPLEMENTING PETITIONER'S OPENING ORAL ARGUMENT.

ROBT. T. DEVLIN,
WM. H. DEVLIN,
GEORGE R. FREEMAN,
HORACE B. WULFF,
Counsel for Petitioner.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 564

F. E. BUFFUM, AS TRUSTEE IN BANKRUPTCY OF HENRY JOSEPH BARCELOUX, BANKRUPT, PETITIONER,

vs.

PETER BARCELOUX COMPANY.

MEMORANDUM SUPPLEMENTING PETITIONER'S OPENING ORAL ARGUMENT.

Pursuant to the order of this Court, petitioner files this memorandum, as a supplement to petitioner's opening oral argument and to be deemed a part thereof. This memorandum enumerates, with appropriate references, those parts of respondent's statement of facts which are deemed to be inaccurate or unsupported by the record or misconstructive of petitioner's contentions and theories. Respondent's statement of facts is found in respondent's brief, pages 2 to 25, inclusive.

Resp. brief, p. 4, 2d par.:

> "It is to be noted that the regularity of the sale was only attacked on the grounds mentioned,"

to wit, lack of demand of notice.

Incorrect. See R. 10, paragraph VIII, where it is alleged, with respect to the pledges and the sale,

> "all of which was so done and taken with intent to hinder, delay and defraud * * * the sale and everything that was done thereunder was fraudulent and void * * * in that all of said transactions were conceived, executed and taken from beginning to end with intent to hinder," etc.

Resp. brief, p. 5, par. denoted as "third"; also the 5th par. on p. 5, beginning "At the time", etc.

The statement is incorrect wherein it suggests that the suit is to recover the value of the shares, less the amount owing to Freeman. Freeman had been dismissed on the incoming of the answer, which contained admissions showing that while Freeman was originally a proper defendant, he was no longer such. See dismissal by consent of Freeman (R. 29). Henceforth the bill stood as a prayer for full recovery.

Resp. brief, p. 5, last par., and p. 6, pars. marked 1, 2, 3, 4.

Respondent states the following facts stand admitted by the pleadings:

1. That a written pledge agreement was entered into.

2. That the shares of stock were delivered to the respondent.

3. That the respondent held a sale under the pledge and sold under it.

4. That the indebtedness is not denied.

The statement that these facts stand admitted is incorrect, because the bill alleged, with respect to each and every of said facts, that they were "purported" (R. pp. 4, 5, 8), and the general tenor of the bill was to allege that they were not in fact as they purported to be.

Resp. brief, p. 6, par. marked (IV).

Respondent here states that the bill admitted the indebtedness secured by the pretended pledge by alleging that the pledge was made "to secure certain preexisting indebtedness," etc. The bill made no such admission. It alleged that Henry "*purported* to secure certain preexisting indebtedness," etc. (R. 4, par. IV), and the bill alleged with respect to all of the claimed debts, that the complainant has no information or belief as to the amount due and upon such lack of information alleged that no sum whatever was then or there due, owing or payable (R. 8, middle of page).

Resp. brief, p. 7, last par., stating that Henry Barceloux delivered Certificate No. 5 to his brother-in-law.

There is no reference to the record substantiating this statement, but see R. 345-347, where the bankrupt testifies with great uncertainty just what was done,

if anything, by way of delivery, but testifies to a delivery in 1917 with an endorsement of 1923.

Resp. brief, p. 8:

> "This certificate of stock was an endorsement as of February, 1923 (R. 335)."

On page 335, George Barceloux testified:

> "That date was put on later,"

and Certificate No. 5, here as an original exhibit, shows different handwritings in the endorsement and date.

Resp. brief, p. 8, 1st par.:

> "It is undisputed that the stock remained in the possession of the secretary."

Incorrect. R. 302 shows that the secretary died in February, 1923, after which time and until July, 1926, the stock certificate was in the hands of Henry Barceloux (R. 346, 296, 302). The pledge agreement, made on a separate instrument (Plaintiff's Exhibit No. 4), was not made until April 27th, 1926, at which time Henry still had and retained possession of the certificate (R. 309, 337).

Resp. brief, p. 8, 3d to 5th par., relating to endorsement of pledge of Certificate No. 5.

It has already been noted that this endorsement was added later in a different handwriting, and further there is much uncertainty where the special endorsement was placed on the certificate (R. 308-309).

Resp. brief, p. 9, 2d par., stating that the pledge agreement of April, 1926, was not made because of any demand of Freeman for payment or security of the judgment.

Incorrect. R. 303, 304, testimony of George Barceloux, shows that the pledge agreement was obtained after 60 days of effort because

> "we became suspicious * * * he finally came for $3,000 to give (Freeman) and that was the limit."

Resp. brief, p. 9, 4th par., stating that the pledge agreement "was primarily prompted by the fact that the minority stockholders" demanded some action be taken, referring to R. 310.

This misapplies the testimony found on R. 310, which related to the second pledge about the 1st of July, 1926, of bank, insurance and garage shares as additional security. The dissatisfaction of the three nephews had nothing to do with obtaining the pledge agreement of April, 1926.

Resp. brief, p. 10, last par., continuing on p. 11, stating that the pledge sale was to satisfy indebtedness created previously under an original arrangement between Henry Joseph Barceloux and his father.

Incorrect. The father died in 1918 (R. 297). After that, testifies George Barceloux, he gave the certificate for security (R. 297-298). Henry Barceloux had the certificate after February, 1923, when his brother-in-law died (R. 302). The ledger sheet (Plaintiff's Ex-

hibit No. 7) shows that no debt existed from Henry Barceloux to the corporation June, 1923.

Resp. brief, p. 12, 4th par., stating that Henry Barceloux testified on page 327 of the Record.

The reference is incorrect; page 327 contains the testimony of George Barceloux. If the intended reference was R. 371, then Henry's testimony is either false or qualified by his testimony shown on Record 367, by that of George Barceloux on Record 314, and by that of Freeman on Record 401, all of which showed that creditors were pressing.

Resp. brief, p. 15, 1st par., stating that Freeman had knowledge of the indebtedness and the pledge, and referring to page 401 of the Record; also the 2d par., stating that Freeman had knowledge of Barceloux's properties and assets, that he knew everything, referring to R. 372.

Incorrect and misleading. On page 402 is found Freeman's testimony that he knew only what Henry told him, and that Henry had given a statement of indebtedness of about $24,000.00. There was no statement of Henry's assets, except that found on page 372, where Henry testified that he gave statements of assets as shown on the books which Henry stated were not correct.

Resp. brief, p. 15, 4th and 5th par., referring to the communication with Mr. Ware and referring to R. 412.

The communications with Ware occurred about the 1st or 2nd of July, as appears from the letters of Ware

& Ware set out in Record, 405 to 409, inclusive. Thus it appears that the communications were made after the assignment was taken and during negotiations to obtain from the corporation an acknowledgment and statement of the indebtedness claimed by it. It was in no sense corroborative or admissive, as claimed.

Resp. brief, p. 17, par. 1 to 3 inc., stating that Henry Barceloux furnished Freeman with a complete statement of assets and liabilities, referring to R. 411.

Incorrect. The statement there referred to was not the statement of indebtedness. The only statement of assets, if any, ever furnished was the one referred to by Henry Barceloux, which he informed Freeman was incorrect (R. 372). It has already been mentioned.

Resp. brief, p. 18, 3d par., stating that Freeman testified that the three kept faith in endeavoring to collect the Donohoe judgment, and referring to R. 413.

Incorrect and misleading. The testimony relates to faith kept up to the time when it became apparent that nothing could be made out of the bankrupt estate of Donohoe. This referred to a time prior to April 27, 1926, when Henry Barceloux gave the pledge agreement assailed in the bill, which pledge agreement was a violation of the promise not to hypothecate any of Henry's properties. See R. 401, bottom of page, where Freeman's testimony appears that he had no notice in June, 1926, of the pledge agreement, other than Henry's statement (See R. 401-402), and see R. 371-372, showing that the agreement between Freeman,

Henry Barceloux and Henry's attorney was not to make any hypothecations.

Resp. brief, p. 20, pars. 3 and 4, referring to record 375, and stating that Henry Barceloux offered Freeman as security the Pacific National and garage and the bank stock, but that Freeman declined that offer and that Barceloux's testimony in this respect is not disputed by Mr. Freeman.

Incorrect. At page 402 of the record, end of second paragraph, appears Freeman's testimony explaining that Barceloux did not want him to take this bank stock, and Freeman said he did not want those things because they were hypothecated for large amounts, but he testified, "I did not refuse to take anything."

Resp. brief, page 20, par. 6, stating that as a result of these various transactions, the Peter Barceloux Company and George R. Freeman were satisfied. This is incorrect. Freeman's debt was never satisfied. There is no proof whatever in the record that Freeman's debt has been paid.

The same misstatement that Freeman was satisfied occurs on page 22, par. 5.

Resp. brief, page 22, par. 3, stating that there is no charge of any conspiracy on the part of the Company and Henry Barceloux to defeat his creditors.

Incorrect. The bill of complaint alleges (R. 10):

> "that said pledges, and each of them, and the sale and everything that was done thereunder was fraudulent and void, * * * in that all

> of said transactions were conceived, executed and taken from beginning to end with the intent to hinder, delay and defraud," etc.

This follows an allegation that the Peter Barceloux Company failed and refused to adjourn the sale, all of which was done with that intent.

Resp. brief, p. 23, last par., saying that the statement in the brief is incomplete and misleading.

It is the respondent's brief which is misleading, because it states that the Gelinas transaction took place after Freeman had been satisfied. His debt was never satisfied, and because he was never paid the transfer to Gelinas is mentioned as a material fact.

Resp. brief, p. 25, 2d par., referring to the statement in the dissenting opinion (R. 469) that Certificate No. 12 bears a feigned date.

Certificate No. 12 is found in Plaintiff's Exhibit No. 3, the stock-book of Peter Barceloux Company, and is dated June 29th, which bears out the statement made in the dissenting opinion, for the reason that said certificate was issued because George Barceloux heard that Freeman recorded a Trust deed on the Lake County Ranch (R. 314), which Trust deed was recorded on July 3rd, 1926 (see Exhibit No. 16).

Resp. brief, p. 53, 2d par., where the statement is made that the property was bid in by George A. Barceloux, who executed a promissory note to the corporation.

This is incorrect. At the pledge sale the property was bid in and purchased by respondent company. This is alleged in respondent's answer (R. 21, middle of page), and the answer alleges that afterwards the Peter Barceloux Company sold all of said securities to George A. Barceloux (R. 26). George Barceloux did not, therefore, take as a purchaser at the pledge sale, but as a purchaser from the corporation.

Respectfully submitted,

ROBT. T. DEVLIN,
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GEORGE R. FREEMAN,
HORACE B. WULFF,
Solicitors for Petitioner.



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CHARLES ELMORE CROPLEY

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1932

No. 564

F. E. BUFFUM, as Trustee in Bankruptcy of Henry Joseph Barceloux, Bankrupt,
Petitioner,

vs.

PETER BARCELOUX COMPANY (a corporation),
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

STEPHEN W. DOWNEY,
Capital National Bank Building, Sacramento, California,
Solicitor for Respondent.

HUSTON, HUSTON & HUSTON,
Woodland, California,

W. T. BELIEU,
Willows, California,

PERCY NAPTON,
Woodland, California,
Of Counsel.



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In the Supreme Court
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United States

OCTOBER TERM, 1932

No.

F. E. BUFFUM, as Trustee in Bankruptcy of Henry Joseph Barceloux, Bankrupt,
Petitioner,

vs.

PETER BARCELOUX COMPANY (a corporation),
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

The respondent, Peter Barceloux Company, is a family corporation organized in 1912. Peter Barceloux had the management and control of the corporation until his death in 1918.

At the time of the organization of the corporation, Certificate No. 5 representing 2499 shares of the capital stock of the company was issued to Henry Joseph Barceloux.

Prior to April 27, 1926, the date of the first transaction involved in this action, Henry Joseph Barceloux delivered Certificate No. 5 to his brother-in-law, Fred Gelinas, secretary of the corporation, as security for his indebtedness to the corporation, and for any future indebtedness that might be incurred by him. No formal pledge agreement was executed at the time. It is undisputed that the stock remained in the possession of the secretary until Henry Joseph Barceloux was elected president of the corporation when it came into his possession as such president, together with the other books, papers and records of the company. At no time did Henry Joseph Barceloux have any possession of the certificate otherwise than as an officer of the corporation.

Henry Joseph Barceloux continued to borrow money. On April 27, 1926, he executed a formal pledge agreement covering the pledge of Certificate No. 5.

On June 29, 1926, he pledged 75 shares of the Pacific National Fire Insurance Company; 9 shares of the Bank of Orland and 100 shares of the Glenn County Garage as security for the indebtedness therein mentioned.

At the time of the pledges of April 27, 1926, and June 29, 1926, Henry Joseph Barceloux and George R. Freeman, administrator of the estate of Frank Freeman, deceased, which held a judgment against Barceloux, were cooperating to enforce that judgment against Charles Donohoe. Their relations were amicable and Freeman was familiar with all of the business affairs of Mr. Barceloux.

The pledge agreement attacked in this action provides that any surplus after the payment of the demands secured thereby should be subject to the order of Henry Joseph Barceloux, except it might be applied at the time of the sale of such pledged property, to any other obligations not mentioned therein held by the company against Henry Joseph Barceloux. It also clothed the company with power "to sell at any time after such notes or interest is due, *without notice or demand,* at the option of the said Peter Barceloux Company the whole or any part of said security, either at public or private sale at their discretion and without notice or demand."

This action only involves the validity of the pledges of April 27, 1926, and June 29, 1926, and does not involve the validity of the pledge previously made by delivery of the stock to Peter Barceloux and thereafter held by the corporation as collateral. No attack is made on the legality of the pledge made prior to April 27, 1926.

In June, 1926, Mr. Freeman requested Henry Joseph Barceloux to secure the payment of the Freeman judgment. It appears by the uncontradicted testimony of Freeman, that he knew of the pledge of the stock to the Peter Barceloux Company. After investigating the affairs of Henry Joseph Barceloux, he accepted from him an assignment of the 2499 shares of the company, subject to the pledge mentioned, with full knowledge of the facts.

Transcript of Record, page 411.

In November, 1926, Mr. Freeman issued an execution on his judgment, but did not levy on the stock

in question. In fact, no question was ever raised regarding the validity of the pledges or the sale thereunder until the filing of this action on April 30, 1928.

Barceloux was adjudicated a bankrupt on February 25, 1927.

Petitioner filed a bill in equity attacking the validity of the pledges of April 27, 1926, and June 29, 1926, on the ground of fraud and irregularities in the sale of the stock to satisfy the pledges.

The fraud relied upon was that the pledge was made for the purpose of defeating the collection of the Freeman judgment. All of the evidence was directed to this point. Although the non-kindred creditors of the bankrupt are mentioned in the bill, no evidence was offered that there was any design or intent to hinder, delay or defraud any creditor, except Freeman.

The Circuit Court of Appeals held that there was no fraud for the reason stated in the opinion, and particularly because Freeman, the principal and only active creditor of Henry Joseph Barceloux, with full knowledge of the transfer by pledge, accepted an assignment subject thereto.

Under these circumstances, it cannot seriously be argued that there was any fraud or any attempt to deceive or delay the collection of the Freeman judgment.

At the time he took his assignment, subject to the pledges of the company, he could have levied an execution and sold the property of the bankrupt subject to the pledges. Instead of taking this course, he

accepted an assignment which gave to him all of the right, title and interest of the bankrupt subject to the pledge.

Furthermore, the fact that the Barceloux Company did not take an absolute transfer of the stock in satisfaction of its debt, but only accepted it as security, leaving all of the value over and above the amount of its pledge subject to the claims of the creditors, conclusively demonstrates that there was no fraud.

The only irregularity in the sale was that an item of indebtedness of $1800.00 due from the bankrupt to Peter Barceloux was included in the demand for which the property was sold. The Circuit Court of Appeals holds that while the legal title to this demand was in Peter Barceloux and not the company "nevertheless the claim therefor was made in good faith."

In the last analysis, the Court makes no determination of the regularity of the sale because of the offer of the respondent to resell the property. The Court says at page 482 of the transcript of the record: "We hold that the pledge was valid and that appellee at most is entitled to what the appellant concedes, namely, a sale of all stock pledged, under an order of Court and to an application of the proceeds to the claims of the Barceloux Company." The decree further provides that if the stock pledged to the company sells for more than the amount due as determined by the Court, the surplus shall be paid to the trustee to be applied to the claim of Freeman as alleged in the complaint; any surplus over and above these two claims shall be applied to the claims of the general creditors.

Having reached the conclusion that the pledge was valid, the Court could direct that either of two courses be followed:

First. Enter a judgment of reversal on the grounds that the pledge was valid and the sale was irregular.

Under such a judgment the Peter Barceloux Company would be compelled to resell the property pursuant to the terms of its pledge. As we have pointed out, the pledge agreement covered the property involved in this action authorizing a sale of the property without notice or demand.

Therefore, if this course had been followed by the Court, it would be within the power of the Peter Barceloux Company to sell without notice or demand.

However, the Court for the benefit and not to the detriment or disadvantage of the petitioner, included in its judgment a reversal on direction that the property be sold and that the Trial Court should fix the time, place and terms of the sale of the stock and to direct the application of the proceeds of the sale in accordance therewith.

Much of the argument of petitioner is based upon this provision of the decree. Our answer to that argument is, as stated, that the petitioner was not prejudiced but was benefited.

If such limitation had not been placed upon the power of the corporation to resell to satisfy its pledge, it could under the laws of California, sell the property in question without notice.

If the rights of any one are restricted or limited by the terms of the decree, it is the rights of the respondent and not the petitioner.

THE PETITION SETS FORTH NO GROUNDS JUSTIFYING THE ISSUANCE OF THE WRIT.

Rule 38, Subdivision 5, of this Court, enumerates the ground on which a writ of certiorari will issue, specifically provides that it is not a matter of right, but of sound judicial discretion, and that the writ will be granted only where there are special and important reasons therefor.

To emphasize the point, we quote the following from the opinion of this Court in *Magnum Import Co. v. Houbigant, Inc.*, 262 U. S. page 159 (162):

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decisions between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

The petitioner makes a feeble attempt to rely on the grounds that the decision of the Circuit Court of Appeals is in conflict with the applicable local decisions and also applicable decisions of other Circuit Courts of Appeals.

Petition, page 11.

The significant feature of this petition and the argument is that the petitioner does not in a single instance point out any conflict between the decision of

the Circuit Court and the other cases referred to in the petition.

It is only fair and reasonable to assume that if such conflict exists, the petitioner would have been only too happy to point out the same.

This Court is not called upon to assume the burden of analyzing the cases referred to in the petition without some assistance from counsel.

The very fact that no conflicts really exist between the cases mentioned is apparent from the statement in the petition:

> "And the decision of the Circuit Court of Appeals on this question is a decision of an important question of local law in a way *probably in conflict* with the applicable local decisions and also applicable decisions of other Circuit Courts of Appeals" (italics ours).

So, we find an absence of any direct statement that there is a conflict, but only the qualified statement that the decision is *probably* in conflict with other decisions of Courts mentioned.

Clearly, a writ of certiorari cannot be issued under the rules of this Court on the ground of conflicting decisions in the absence of a showing to that effect. The fact that the petitioner qualifies his statement with the word "probably" is in itself an admission that no such conflict exists.

We therefore, at the outset make the point that this petition should be dismissed because it does not state any grounds bringing it within the rule above mentioned.

It is apparent that the petitioner is imbued with the idea that the object of the writ is to give the defeated party another hearing.

Consequently, we will review the cases mentioned in the petition and argument of petitioner as being in conflict with the decision of the Circuit Court of Appeals. It will appear therefrom that there is absolutely no conflict and that the decision of the Circuit Court is in harmony with all of the points decided.

We will now take up a discussion of the argument of counsel and for convenience will adopt the order in which the points are discussed.

A.

"THE CIRCUIT COURT OF APPEALS ERRONEOUSLY CONSTRUED SECTION 70 e OF THE NATIONAL BANKRUPTCY ACT IN DENYING TRUSTEE (PETITIONER) THE ELECTION TO RECOVER VALUE IN AN ACTION UNDER SAID SECTION."

A complete answer to this point is that the Circuit Court of Appeals did not construe Section 70 e of the National Bankruptcy Act as denying the petitioner the election to recover the value of the property in an action under that section. This is manifest from a reading of the opinion, and this statement is entirely contrary to the holding of the Circuit Court of Appeals.

This transfer was made more than four months prior to bankruptcy. In that case the trustee is authorized by Section 70 e to maintain an action to avoid any transfer "which any creditor of such bankrupt might have avoided," and may recover the property

so transferred or its value from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication.

The Circuit Court held, as appears in the opinion, page 474 of the Transcript of the Record, that under this section, the trustee is simply authorized to enforce the rights of creditors in accordance with the laws of the state applicable to the transaction.

This is in harmony with all of the decisions on the subject.

In *Schainman v. Dean,* 24 Fed. (2d) 475, the Court said with reference to Section 70e:

> "Under this section it is option with the trustee whether he shall proceed at law or in equity, and whether he shall pursue the goods, or sue for their value, or for their conversion."

Neither the respondent nor the Circuit Court of Appeals has taken the position that the trustee has no such election.

The question before the Court was, the trustee having elected to file a bill in equity, and it appearing that the property in question was available to satisfy the judgment, a Court of Equity would direct the return of the property.

In *Brainard v. Cohn,* 8 Fed. (2d) 13, which, it is claimed, conflicts with the decision in this case, it is held that the District Court had jurisdiction to invalidate any transfer by the bankrupt of his property which any creditor might have avoided, giving the trustee the right to recover the same. It is also held

in that case that the District Court has equity jurisdiction to set aside a transfer made by a bankrupt and to subject the property to the administration of a Court of bankruptcy.

In this case the transfer has not been set aside, but upheld.

If the Court had sustained the claim of fraud, then under the authority of that case, the trustee had the right to recover the property and subject it to the administration of the court of bankruptcy.

However, that rule could not be applied in the *Brainard* case because the property had been mixed and confused beyond possible identity with the property of the defendants; that the intermixture was intentional. For that reason a money judgment was entered.

In *Oliver v. Brennan,* 299 Fed. 106, another case which petitioner claims is in conflict with this decision, the same construction was given to Section 70 e. The only objection made to the decree was that it was too uncertain and indefinite.

Referring to page 474 of the Transcript of Record, the discussion of the Circuit Court of Appeals on this subject will be found. The Court ascertains and determines the right of the trustee to be that of creditors under Section 3439 of the California Civil Code, and cites a decision of that State as to the relief to be granted in such cases.

Section 70 e does not "enable the trustee, as a liquidating officer for all the creditors, to recover that

which is more advantageous to the creditors with the least possible litigation."

Petition, page 23.

The construction of this section gives to the trustee all of the power and authority vested in him by Section 70 e.

On page 24 of the petition it is asserted that the Circuit Court of Appeals has decided that in any creditor's suit against a fraudulent transferee of property, a money decree could not be entered if at the time of the decree the specific property may be reached and subjected to the creditor's claim.

The Court is dealing with the subject of the relief that could be granted in an equity proceeding to set aside a transfer of property in fraud of creditors.

The equity rule is declared in the case of *Wacy v. Holbrook,* 125 N. Y. S. 1088, cited in the opinion of the Court, Transcript of the Record, page 476.

Where equity acquires jurisdiction, it disposes of the entire controversy and its incidents.

If it appears in an equity proceeding from the facts disclosed on the hearing, but not known to the plaintiff when he brought his suit, that the plaintiff is entitled to the only alternative relief possible of damages, the Court may and generally will, instead of compelling the plaintiff to incur the double expense and trouble of an action at law, retain the case and decide all the issues involved.

Connecticut Fire Ins. Co. v. McNeil, 35 Fed. (2d) 675.

As appears from the opinion, the Court was dealing not with any right of election on the part of the trustee, but with the question of what relief should be granted in a Court of Equity in an action of fraud where it appears that the property transferred could be restored to the plaintiff by decree of the Court.

However, it would seem that this question is not involved in the petition now pending because as we have shown, the reversal was ultimately based on the finding that the pledge was valid.

If the Court had sustained the finding of fraud and reversed the case on the ground that the plaintiff should take the property and not damages, the question might be involved.

B.

"IN A FEDERAL EQUITY APPEAL, NO NEW EVIDENCE CAN BE RECEIVED (U. S. REV. STAT. SECTION 698; U. S. CODE TIT. 28, SECTION 863)."

We need not concern ourselves with the question of the introduction of new evidence in an equity appeal because no such question is involved.

The Court did not receive any new evidence. The certificate of stock in question was introduced in evidence in the Trial Court. As we have already shown, that part of the decision directing the sale of the stock was not based on the introduction of the certificates in evidence, but was due to the desire of the Court and the respondent to end the litigation. The respondent voluntarily in open Court subjected the stock to the jurisdiction of the Court.

All of this was to the advantage of the petitioner.

Aside from the question of the reception of the offer of counsel, the decree was within the issues and is fully supported by the evidence.

Paragraph IX of the complaint alleges that George A. Barceloux purchased the property at the pledge sale August 16, 1926, and has at all times thereafter and still does purport to hold and possess said securities as owner thereof.

Transcript, page 11.

The answer admits the purchase, but denies that Barceloux has at all times since the purchase either owned or purported or claimed to hold or possess the securities.

Transcript, page 26.

At the trial, George A. Barceloux testified that he gave his promissory note for the purchase price of these securities and pledged the same as collateral. He also testified that all of the securities had been transferred to the respondent prior to the trial, and his note returned.

Transcript of Record, page 418.

Regardless of the proceedings in the Circuit Court of Appeals, the record clearly shows the ownership and possession of the shares in question, except such as had been sold, and if there had been any question on the point, the proper judgment for the Court to enter was to direct the sale of the securities if they were on hand, and if not, that the petitioner have a money judgment for the value thereof.

This is the effect of the decision of the Circuit Court of Appeals.

However, in view of the holding of the Court that the pledge was a valid transaction, the Court could not under any circumstances have awarded or directed a judgment in favor of the petitioner for either the stock or its value.

The argument of the petitioner is based on the assumption that the Circuit Court of Appeals has sustained the finding of fraud and invalidated the pledge. Such is not the decision.

So the proposition reduces itself to the correctness of the decision of the Circuit Court of Appeals holding that the pledge was valid and directing the sale of the property with the consent of the respondent instead of a reversal without directions.

As to the action of the Circuit Court of Appeals in crediting the amount due the respondent with the value of these shares, petitioner cannot complain. Had no such credit been made by the Court, the company would have been compelled to credit this amount on the indebtedness before making the sale.

Again, if the company had credited the amount, the credit of the company would have been for the amount actually received, while the credit directed by the Court is for the value as found by the Master.

Again, the petitioner profits by the decision.

C.

"THERE IS NO JURISDICTION IN A FEDERAL COURT OF EQUITY IN A CONTROVERSY ARISING OUT OF BANKRUPTCY TO ADJUST THE PRIORITIES AND DISTRIBUTE THE PROCEEDS OF THE PROPERTY OF THE BANKRUPT ESTATE, THAT BEING THE EXCLUSIVE PROVINCE OF A COURT OF BANKRUPTCY UNDER NATIONAL BANKRUPTCY ACT SECTIONS 2 (7), 47(a), (2), AND 70 (b), (c)."

This assignment finds no support in the record. The Circuit Court of Appeals made no attempt to adjust the priorities and distribute the proceeds of the property of the bankrupt estate.

On the contrary, in this action the Circuit Court of Appeals had the respondent as pledgee, Freeman as the owner claiming the property subject to the pledge, and the trustee in bankruptcy representing the creditors as parties. The determination of the Court was between these three parties involved in the action, and it in no way attempted to determine the priorities of creditors in violation of the provisions of the Bankruptcy Act.

It is stated that Freeman was not a party to the suit and that no claim of his remained involved in this suit.

This is a strange argument in view of the bill filed by the petitioner in which the relief he seeks is the value of the property in excess of the amount due Freeman under his assignment.

See prayer of the complaint, Transcript of Record, page 13, where the relief asked for is

> "For the value of all of said shares of stock at the time of said sale, to wit, August 16th, 1926, less such sum, if any, as may be found to be due

or owing to George R. Freeman, as administrator of the estate of Frank Freeman, deceased."

So, how can the petitioner complain of a judgment which directs the application of the proceeds of the sale in strict accordance with the prayer of his bill?

The Bankruptcy Court takes jurisdiction of the priorities of the creditors after the property has reached the hands of the trustee.

D.

"THE TRUSTEE IS NOT PRECLUDED, IN A SUIT ON BEHALF OF ALL CREDITORS, FROM ASSERTING THAT A TRANSFER WAS FRAUDULENT BY THE FACT THAT ONE OF THE CREDITORS TOOK ADDITIONAL SECURITY WHICH RECITED THE EXISTENCE OF THE TRANSFER ASSAILED AS FRAUDULENT."

We repeat that the Circuit Court of Appeals did not decide that the trustee was precluded from maintaining an action to set aside a fraudulent transfer by reason of the fact that one of the creditors took additional security which recited the existence of the transfer assailed as fraudulent.

At no time has any such argument been made by respondent, and such a statement is a plain misinterpretation of the Court's decision.

In its opinion, the Circuit Court of Appeals considered the case from the standpoint of Freeman alone, and likewise from the standpoint of the creditors generally.

To assert that this action was prosecuted on the basis of a design on the part of the respondent to

commit a fraud against the general creditors is to ignore the entire record and theory of petitioner.

As we have already indicated, this transaction was attacked on the ground that it was designed to defraud Freeman.

By reference to the opinion it will be noted that on page 472 of the Transcript of the Record, the Court held that Freeman ratified the transaction by accepting an assignment subject to the pledge at a time when he believed there was ample equity to secure his claim.

The Court first decides that there was no fraud committed on Freeman.

It then on page 472 takes up the question of the rights of the trustee as representative of creditors other than Freeman.

Attention is directed to the fact that the complaint does not allege the existence of a single creditor other than Freeman, nor that any other creditor was affected by the pledge and sale.

As stated by the Court, "the case was tried with his rights particularly in view."

The Court holds that neither the pleading nor the proof will sustain a finding of fraud against the creditors other than Freeman.

The Court did not hold that there was any estoppel. No question of estoppel is involved in the decision. The Court holds that the evidence was insufficient to establish a claim of fraud against Freeman and that neither the pleading nor the proof was sufficient to

justify that any fraud was committed on the general or non-kindred creditors of the bankrupt.

The statement appears at the bottom of page 31 of the petition:

> "The decision of the Circuit Court of Appeals deprives the Trustee (an officer of the Court) of the right of representing all creditors granted to him by Section 70 e of the National Bankruptcy Act,"

and that the construction placed on that section is in conflict with *Moore v. Bay,* 284 U. S. 4.

Again, we repeat that the Court has made no such decision as is evident from the discussion in the opinion as to the rights of Freeman and the rights of general creditors.

The opinion simply holds that in this action, the trustee has failed to establish fraud either against Freeman alone or the creditors generally.

E.

"UNDER THE LAW OF CALIFORNIA, A CORPORATION OF THAT STATE IS PROHIBITED FROM ACQUIRING ITS OWN ISSUED SHARES EXCEPT UNDER CIRCUMSTANCES NONE OF WHICH APPEAR IN THIS RECORD (CALIFORNIA CIVIL CODE, SECTION 309, IN FORCE IN 1926)."

In the first instance, the petitioner claims, according to his pleading, that the pledge was fraudulent and the sale therefore invalid.

On this assumption the property would still be vested in the bankrupt.

For the purposes of making this point, the petitioner takes the inconsistent position that George A. Barceloux acquired the legal title to the stock by purchase at the pledgee's sale. It is then argued that the corporation had no power to repurchase this stock from George A. Barceloux.

The stock was sold to George A. Barceloux and he repledged the same to the corporation to secure his promissory note for the purchase price.

On the authority of *Ralston v. Bank of California,* 112 Cal. 208, this repurchase was valid and legal.

There is nothing in the *Stevens v. Boyes Hot Springs Company,* 113 Cal. App. 479, that conflicts with the *Ralston* case.

In the *Stevens* case, there was an outright purchase of the stock by the corporation. The stock was not acquired by the corporation in satisfaction of a pledge.

The whole subject is reviewed in the case of *Stewart v. Stewart Hotel Company,* 33 Cal. App. 167, and the Court announces that there are exceptions to the general rule as to the power of a corporation to purchase its stock.

As in other instances, petitioner contents himself with the mere generalization that the decisions are conflicting without pointing out any particulars in which they conflict.

There is no conflict.

F.

"IT WAS ERROR TO ASSUME JURISDICTION OVER THE 2499 SHARES OF DEFENDANT'S STOCK BY REASON OF THE MERE INTRODUCTION OF CERTAIN CANCELLED CERTIFICATES IN EVIDENCE."

This point is covered in the foregoing discussion.

Suffice it to say that the Court did not assume jurisdiction by reason of the mere introduction of certain cancelled certificates in evidence. The decision of the Court is not based on any such foundation.

As we have shown, the undisputed evidence establishes the fact that the title to this stock stands in the name of the corporation. The certificates are in the possession of the Court, and the respondent stipulated in open Court that the Court may enter a judgment directing the sale of the stock.

As already appears, this action of the Court was more favorable to the petitioner than if the Court had reversed the case without any direction as to the terms and manner of sale, leaving the respondent in a position under the laws of the State, to legally sell the stock in question without notice.

Had the Court decided that the pledge was valid, but the sale was irregular and invalid, still it is the established law of California that the purchaser acquires the rights of the original pledgee, and that the debtor, or his successors may not take the property from such purchaser without discharging or offering to discharge the original obligation.

Cushing v. Building Association etc., 165 Cal. 737.

This case also holds that discharge of the original obligation is essential to the extinguishment of the lien of the pledge possessed by the party who is in possession of the property. Neither the pledgor nor his successors can treat the sale by the pledgee as ineffectual to absolutely transfer the pledged property and at the same time treat it as effectual to the extent of extinguishing the obligation for which the property was held in pledge. The same rule applies where the pledgee made the unauthorized sale to himself.

G.

"THE SALE BY THE CORPORATION OF THE STOCK ACQUIRED AT A PLEDGE SALE HELD INVALID CONSTITUTED A CONVERSION AND THEREFORE THE MONEY JUDGMENT WAS PROPER AND SHOULD HAVE BEEN AFFIRMED FOR THAT REASON."

No such question is now involved in this action.

If judgment had been awarded to petitioner, then the question of the relief to which he was entitled would be involved.

Here, the Court having held that the pledge was valid, there is no question of conversion.

In the case of *Lowe v. Ozman,* 3 Cal. App. 387, cited in the petition, it is held that to constitute a conversion, it is necessary to show a defiance of the pledgor's rights.

How can there be any claim of conversion when the sale was made pursuant to a contract or pledge, and in accordance with the terms thereof. In no instance has there been any defiance of the pledgor's rights.

Mere irregularity in a sale neither destroys the pledge nor amounts to a conversion.

The Court did not hold the pledge sale invalid as stated in the argument. Neither has the respondent at any time repudiated the pledge.

The case of *Bell v. Bank of California,* 153 Cal. 234, does not deal with the question of conversion but only involves the statute of limitations.

In *Henning v. Akin,* 91 Cal. App. 246, plaintiff was seeking to recover the surplus remaining in the hands of the pledgee over and above the debt after an invalid sale of the pledged property.

In *Dibert v. Wernicke,* 214 Fed. 672, the pledgee purchased at his own sale and for the avowed purpose of acquiring ownership.

Feilback Co. v. Russell, 233 Fed. 412, involved the sale of property acquired under a preferential transfer made within four months of the adjudication of bankrupt.

H.

"THE DECISION OF THE CIRCUIT COURT OF APPEALS IGNORED THE TRIAL COURT'S FINDING THAT THE PLEDGE OF APRIL 27, 1926, WAS VOID AS TO CREDITORS FOR WANT OF IMMEDIATE DELIVERY AND A CONTINUED CHANGE OF POSSESSION AS REQUIRED BY SECTION 3440 OF THE CIVIL CODE OF THE STATE OF CALIFORNIA."

The Circuit Court of Appeals did not ignore the question of a change of possession under Section 3440 of the Civil Code.

On page 470 of the opinion, the Court discusses the views of the Trial Court on the subject of delivery, and held that it depended upon the weight to be given to the testimony of Henry Barceloux.

If we disregard the testimony of H. J. Barceloux, then there is an absence of evidence on the subject of delivery.

The bill alleges that Barceloux purported to deposit with the Peter Barceloux Company the securities in question.

Transcript, pages 4 and 5.

On page 6 of the transcript it is alleged:

> "And that said defendant accepted said additional security knowing of such intent of Henry Joseph Barceloux and when it already possessed property of said Henry Joseph Barceloux as security for such indebtedness."

So the pleading itself alleges a delivery to the corporation.

According to the testimony of Barceloux, the stock was delivered to the secretary of the corporation long prior to April, 1926; that the only time that Barceloux had any control over it was during the period that he was president of the company when he took possession of all of its assets; that upon his resignation as president, the stock was turned over to his successors.

It is settled by the California authorities that even after the delivery of personal property under Section 3440, the party making the delivery is not precluded

from having some connection or control thereof if consistent with the original transaction.

Manor v. Dunfield, 33 Cal. App. 560;
Hilliker v. Kuhn, 71 Cal. 220.

It is not denied that the stock was delivered to the corporation under the pledges of April and June, 1926, and thereafter continuously remained in the possession of the officers of the corporation.

H. J. Barceloux had nothing to do with these shares of stock after this pledge and his resignation. This was made more than four months prior to bankruptcy.

Llewelyn v. Levi, 157 Cal. 31;
Wiener v. Union Trust Co., 261 Fed. 709;
Sexton v. Kessler & Co., 172 Fed. 535.

The property being already in possession of the defendant, no redelivery to him was necessary.

Smith v. Mott, 76 Cal. 172.

I.

"THE TRIAL COURT'S FINDINGS OF FACT SHOULD NOT BE REVERSED ON APPEAL WHEN BASED UPON THE TESTIMONY OF WITNESSES HEARD AND OBSERVED BY THE TRIAL JUDGE AND ALSO BASED ON WRITTEN EVIDENCE CONSISTENT WITH HIS FINDINGS AND INCONSISTENT WITH CONTRARY FINDINGS."

The decision of the Circuit Court of Appeals is based upon the undisputed evidence. It is supported by the testimony of Mr. Freeman called as a witness for the petitioner. George and Henry Barceloux and Mrs. Gelinas were also called as witnesses by the petitioner.

No proof outside of the testimony of these witnesses was produced by petitioner. If the testimony of George and Henry Barceloux and Mrs. Gelinas is rejected, then the petitioner stands without proof other than the testimony of Mr. Freeman.

The only conflict between the testimony of Mr. Freeman and H. J. Barceloux is that Mr. Freeman claimed that Mr. Barceloux stated the indebtedness was $24,000.00 when it was in fact $35,000.00. This variance is of no consequence on the issue of fraud.

There is no conflict in the evidence as to the pledge transaction and Mr. Freeman's knowledge of it, and his acceptance of an assignment subject to the pledge.

Mr. Freeman also testified that he considered Mr. Barceloux solvent at the time of the pledge. The pledge was for an adequate and valuable consideration.

It is undisputed that H. J. Barceloux was indebted to the corporation.

The petitioner points out no written evidence inconsistent with any statement of fact made in the opinion. On the contrary, all of the written evidence on the subject is consistent with the pledge. All of the transactions between H. J. Barceloux and the company were entered in the books of the corporation, and there is not a single writing in the evidence inconsistent with the validity of the pledge or that it was made in good faith.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISIONS OF THE FEDERAL AND STATE COURTS.

We have already reviewed the cases cited on page 12 of the petition.

On page 38 of the petition it is claimed that the decision is in conflict with the cases cited on that page.

We repeat that petitioner has not pointed out any conflict. An examination of the cases shows that there is no conflict.

Casey v. Cavaroc, 96 U. S. 467, deals with the French law and the civil law. We take this excerpt from page 479:

> "So, if it be delivered back to the owner in a new character; as, for example, as a special bailee or agent. In such case, the pledgee will still be entitled to the pledge, not only as against the owner, but also as against third persons."

This disposes of any claim of failure of delivery based on the proposition that the stock certificates were in the hands of H. J. Barceloux as president of the company.

The claim is also unsound because the stock was in possession of other officers of the company a long time before he became president, and was also continuously in the custody of other officers of the company after the pledge of April, 1926.

In the case of *McFall v. Buckeye etc. Assn.*, 122 Cal. 468, it was held that there was no delivery because the stock was immediately returned.

Harvey v. Stowe, 219 Fed. 17, holds that it is unnecessary to change the registration of the stock to constitute a valid pledge and that under the facts in that case there was a delivery.

CONCLUSION.

With the exception of the point that the decision of the Circuit Court of Appeals is in conflict with the decisions of the State and Federal Courts, there is nothing in the petition bringing it within the rule governing the issuance of certiorari by this Court. The petition does not in any instance show any conflict between the decisions but is based upon the mere generalization that it is probably in conflict with the cases cited in the petition.

This petition is merely an effort on the part of the petitioner to secure another hearing on the whole case by this Court, which practice is contrary to its rules and its decisions.

Dated, Woodland, California,
January 6, 1933.

Respectfully submitted,
STEPHEN W. DOWNEY,
Solicitor for Respondent.

HUSTON, HUSTON & HUSTON,
W. T. BELIEU,
PERCY NAPTON,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

this 7th *day of January, 1933.*

Robt. J. Devlin

Wm L. Devlin

Arthur C. Devlin

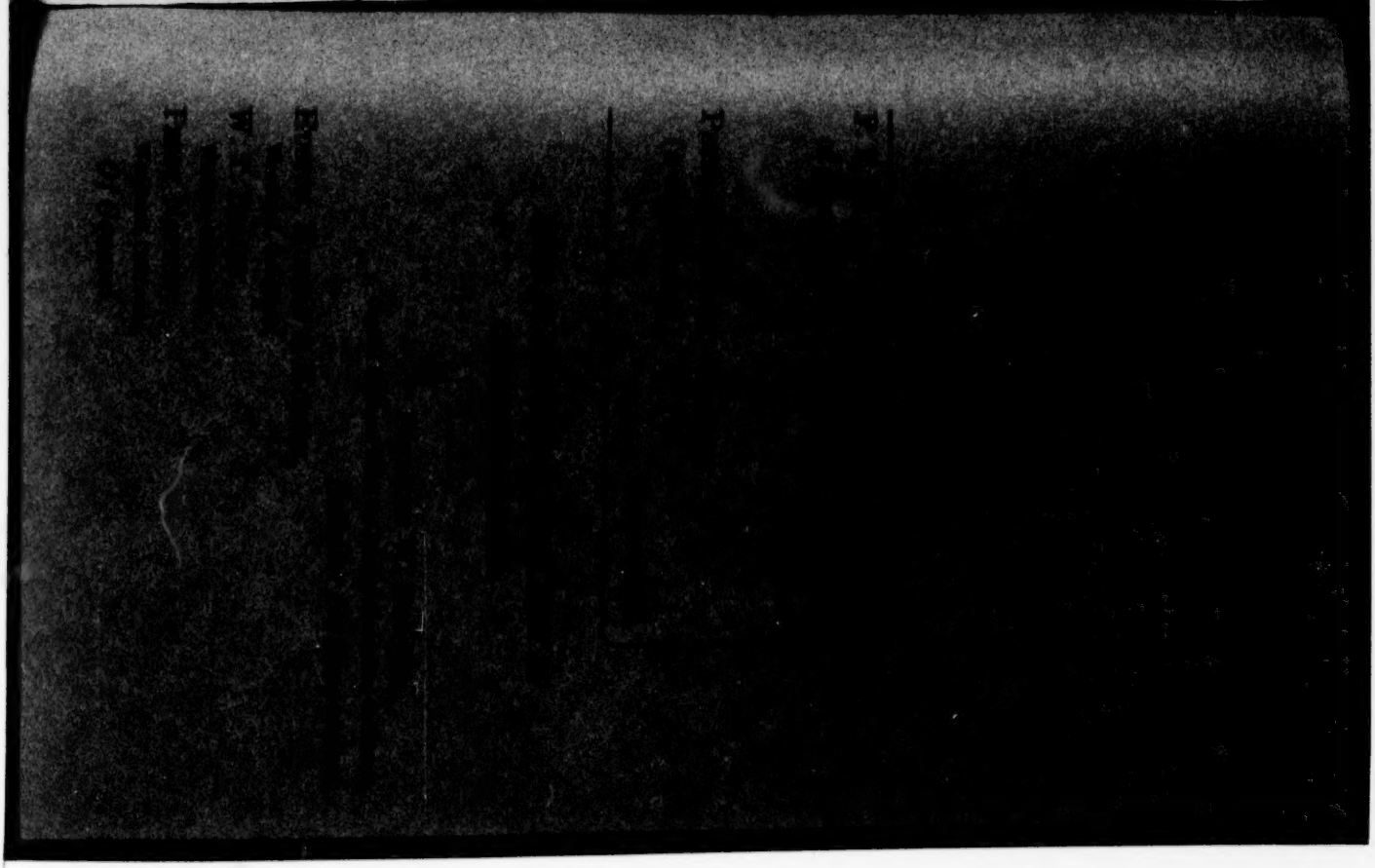
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Horace B. Stulff

George A. Freeman

George F. Longsdorf

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1932

No. 564

F. E. BUFFUM, as Trustee in Bankruptcy of Henry Joseph Barceloux, Bankrupt,
Petitioner,

vs.

PETER BARCELOUX COMPANY (a corporation),
Respondent.

BRIEF OF RESPONDENT AFTER WRIT OF CERTIORARI GRANTED.

THE PETITION SETS FORTH NO GROUNDS JUSTIFYING THE ISSUANCE OF THE WRIT.

In respondent's brief opposing petition for writ of certiorari, the point was made that the petition discloses no grounds justifying the issuance of the writ.

The petitioner urged in his petition that the decision of the Circuit Court of Appeals was in conflict with applicable decisions of the state and federal

Courts. This ground is now abandoned by the petitioner because it is not urged in his brief.

None of the questions urged in the brief bring the case within Rule 38, Subdivision 5, of this Court.

STATEMENT OF FACTS.

The bill of complaint attacks two pledges made by Henry Joseph Barceloux to the Peter Barceloux Company. One in writing dated April 27th, 1926, and the other by delivery of certain shares of stock on June 29th, 1926. The bill of complaint alleges the execution of the pledge agreement of April 27th, 1926, and a copy thereof is attached to the bill (Paragraph IV of Bill, R. 4).

The execution of this pledge agreement is admitted by the answer.

In the same paragraph it is alleged that pursuant to said agreement and at the time of the execution thereof, Barceloux purported to deposit with the corporation Certificate No. 5 evidencing 2499 shares of the capital stock of the corporation.

It is alleged that this was done with the intent to dispossess himself of the bulk of his properties and assets to prevent his nonkindred creditors from satisfying their respective claims; that the company entered into the transaction with notice of the intent of Barceloux to defraud such creditors.

The answer denies that the delivery was a purported one.

Under the pleadings and undisputed evidence, it is clearly established that the pledge agreement was executed on the 27th day of April, 1926, and Certificate No. 5 was delivered to the respondent on that date.

Paragraph V of the bill alleges that, on the 29th day of June, 1926, Henry Joseph Barceloux purported to deposit with the respondent certain certificates of stock therein described as additional security for the indebtedness due said corporation.

This pledge is also attacked on the ground of actual fraud on the part of the respondent and Henry Joseph Barceloux. It is alleged that it is made without consideration.

Paragraph VI of the bill of complaint alleges that on the 16th day of August, 1926, respondent held a sale for the payment and satisfaction of the purported obligations and indebtedness set forth in the pledge agreement "and also the following additional purported indebtedness or obligations" (R. 6).

Paragraph VIII of the bill attacks the sale on the ground that it was made without demand for the payment of the indebtedness and without any notice thereof and without bidders being present at such sale; that the price realized from said sale was grossly inadequate and that the sale was improvident; that respondent failed and refused to adjourn said sale, all with the intent to hinder, delay and defraud the nonkindred creditors of Henry Joseph Barceloux. The only other ground of attack being that the item of $1800.00 was not an obligation accruing or belong-

ing to the respondent, and on information and belief that no sum whatever was due to the company or secured by the pledges, or either of them, and that the attorney's fee was excessive.

It is to be noted that the regularity of the sale was only attacked on the grounds mentioned.

Paragraph X of the bill alleges that the defendant George R. Freeman, as administrator, claimed that the 2499 shares of the capital stock of the Peter Barceloux Company had been transferred and assigned to him as such administrator by way of security for the payment of a considerable sum of money due from Henry Joseph Barceloux (R. 9).

The bill also alleges "that an accounting is necessary to ascertain what moneys, if any, were at the time of said sale and now are due or owing to said George R. Freeman upon the security of said transfer and assignment."

And also "that it is necessary that the equities of all parties hereto be adjusted in one action; and that complainant is entitled to recover from the defendant Peter Barceloux Company the excess, if any, over and above the amount, if any, found to be due and owing to said George R. Freeman upon the security of said transfer and assignment at the time of said sale and still remaining due and owing, and the value of all said shares of stock at the time of said sale" (R. 12).

The bill then prays for relief as follows:

First. That an inquiry and accounting be had and made as to the moneys, if any, due from Henry

Joseph Barceloux to Freeman, as administrator, on August 16th, 1926, and at the time of the filing of the complaint and secured by the assignment from Barceloux to Freeman;

Second. That an inquiry and decree be had and made as to the value of all of said stocks *on August 16th, 1926.*

Third. That the pledges of April 27th, 1926, and June 29th, 1926, be decreed fraudulent and void and that complainant have judgment against the respondent *for the value of all of said shares of stock at the time of the sale, to-wit: August 16th, 1926, less such sum, if any, as may be found to be due or owing to George R. Freeman, as administrator, etc.*"

Fourth. That an inquiry and decree be had and made as to the respective rights and equities of the parties hereto and for general relief.

At this time we direct the attention of the Court to the fact that the petitioner and plaintiff was not awarded the judgment prayed for in the bill, to-wit: the value of all of said shares of stock "less such sum, if any, as may be found to be due or owing to George R. Freeman as administrator," but petitioner and plaintiff has been awarded a judgment not for the value of the stock on August 16th, 1926, but for the highest market value thereof between the dates of the pledges and the date of the Master's audit.

We will discuss this point in a subsequent portion of the brief.

It will be observed that the following facts stand admitted by the pleadings:

1. That a written pledge agreement was entered into between Barceloux and respondent on April 27th, 1926, and that the shares of stock included therein were delivered at the time of the execution of this agreement.

2. That the shares of stock referred to in paragraph V of the bill were delivered to the respondent on the 29th day of June, 1926, and were accepted by it (R. 6).

3. That the respondent held a sale on August 16th, 1926, at which the securities mentioned in the bill were sold "for the payment and satisfaction of the purported obligations and indebtedness set forth in said pledge agreement and attached hereto and marked Exhibit 'A,' and also the following additional purported indebtedness or obligations."

4. It is not denied that there was an indebtedness existing in favor of the respondent because it is alleged that the pledge was made "to secure certain preexisting indebtedness evinced by certain promissory notes in said agreement set forth" (R. 4).

The only question raised as to the amount of the preexisting indebtedness is the allegation that petitioner had no information or belief as to the amount secured.

The statement of facts contained in the petitioner's brief is incomplete.

The Peter Barceloux Company was a family corporation organized in 1912 by Peter Barceloux, who, with his wife, transferred certain real and personal property to the corporation in exchange for all of its

capital stock, except certain qualifying shares. One-fourth of the stock was issued to each of his children, Henry Barceloux, George Barceloux and Cora Gelinas, and one-fourth in trust for his nephews.

In the transfer to the corporation, Exhibit 8, not printed in the transcript, but filed with the Court as an original exhibit and appearing on page 26 of appellant's opening brief in the Circuit Court of Appeals, is found the reservation:

> "That the said parties of the first part reserve and except from such conveyance all of the rents, issues and profits and income from the said real and personal property as long as they or either of them may live."

Peter Barceloux continued in the active management of the corporation until his death, which occurred in 1918.

At the time of the trial of this action and the entry of judgment, Lumina Barceloux was still living.

At the trial the corporate books and records were introduced in evidence and are now before this Court. The corporation kept full and complete records and books of account showing all of its transactions from the date of its organization to the date of trial.

At the time of the organization of the corporation, it issued to Henry Joseph Barceloux Certificate No. 5 for 2499 shares.

Prior to April 27th, 1926, the date of the first transaction involved in this action, Henry Joseph Barceloux delivered Certificate No. 5 to his brother-in-law, who was acting for the corporation, as collateral

security for his indebtedness to the corporation and for any future indebtedness that might be incurred by him. No formal pledge agreement was executed at the time. It is undisputed that the stock remained in the possession of the secretary.

This pledge was established by the testimony of George and Henry Barceloux.

Certificate No. 5 introduced in evidence bears the endorsement that it is pledged to the Peter Barceloux Company as pledgee for Henry Joseph Barceloux as security for the payment of certain notes described therein and "as security for prior and future loans." This certificate is referred to in the question propounded to the witness Barceloux on page 307 of the transcript of record.

This certificate of stock shows an endorsement as of February, 1923 (R. 335).

This written endorsement on the certificate stands unimpeached by any evidence whatever, and is supported by the testimony of George and Henry Barceloux when called as witnesses by the petitioner.

The existence of this pledge is recognized by the allegations of the bill above mentioned.

The pleadings in no way attack the validity of the pledge made by delivery of the certificate prior to April 27th, 1926.

Under the undisputed evidence, from the date of the delivery of the shares of stock to either Peter Barceloux or the secretary of the company many years before the election of Henry Joseph Barceloux,

this certificate of stock was in the possession of the company and its officers other than Henry Joseph Barceloux.

Mr. Barceloux continued to increase his indebtedness with the corporation until 1926.

The pledge agreement of April, 1926, was not made because of any demand of Freeman for payment or security of the judgment. The company had a valid existing pledge by reason of the delivery and possession of the stock to secure an indebtedness due it. The agreement of April 27th, 1926, did not create any new indebtedness or any new obligation, but simply evidenced existing obligations.

This writing was sought for a number of reasons. It was primarily prompted by the fact that the minority stockholders, consisting of the three nephews, were dissatisfied with the situation and were demanding that some action be taken in connection with this loan (R. 310).

By the terms of the pledge agreement, the 2499 shares of stock were to stand as collateral security for the payment of a promissory note for $24,064.48 dated June 17th, 1925, a promissory note for $3500.00 dated February 6th, 1923, and a promissory note for $2000.00 dated April 27th, 1926. This agreement did not include all of the indebtedness due from Henry Joseph Barceloux at the time of its execution because the certificate was already held under the previous pledge. This is evidenced by the recital in the instrument "that any surplus after the payment of said notes, interest, commissions and expenses to be sub-

ject to my order, except that if said Peter Barceloux Company shall at the time of such sale hold any other of my obligations they may use such surplus toward the payment of any such obligations."

It also vested the corporation with power "to sell at any time after such notes or interest is due without notice or demand at the option of the said Peter Barceloux Company the whole or any part of said security either at public or private sale at their discretion and without notice or demand."

At this point we emphasize the proposition that this stock was only transferred as security, and the surplus remaining after the payment of the notes was expressly reserved to the pledgor.

The fact that the company only asked for and accepted security instead of asking for a transfer of the stock in satisfaction of the debt clearly negatives any idea of any attempt to put the property beyond the reach of either Freeman or any other creditor of Barceloux.

After the execution of these pledges, Barceloux resigned as president and director and sold his qualifying share to Mrs. Gelinas. This is consistent with the transaction whereby he had pledged his stock to the company. Being indebted and because of the dissatisfaction with his management it was logical that he should surrender his management of the corporation.

On August 5th, 1926, the corporation adopted a resolution directing the sale of the property not only to satisfy the specific indebtedness mentioned in the pledge agreement, but to satisfy the indebtedness

created previously, and for which the corporation held the certificate of stock as collateral under the original arrangement between Henry Joseph Barceloux and his father, who was in charge of the corporation.

These steps were all taken in regular order and the whole transaction is set forth in detail in the minutes of the corporation (Plaintiff's Exhibit 5).

The corporation recognizing that, it held the stock as collateral for previous loans, and that there was no waiver of notice or demand under the original arrangement with the father, followed the legal requirement of serving notice and demand before making the sale. The notice of sale recited that Barceloux had pledged to the company the security for the payment of $35,814.41 which included all of the indebtedness due at that time. The sale was not based alone on the pledge created by the written agreement, but on all of the pledges made to the corporation.

Inasmuch as this action only involves the validity of the transfers of April 27th, 1926, and June 29th, 1926, it must fail because under the pledge sale the Peter Barceloux Company acquired the legal title under the former pledge which is not in any way involved in this proceeding or judgment herein.

No attack was made on the legality of this last pledge until the filing of this action on April 3rd, 1928.

During all of this period of time Henry Joseph Barceloux was a man of large affairs, owning real and personal property, the president of a bank, and

was regarded as entirely solvent by all parties, including Mr. Freeman, who, after a thorough investigation of his affairs, concluded that he was solvent.

On page 412 of the record he testifies "at the time I made the investigation of the assets and liabilities of Henry Barceloux and taking his values, I could not conclude other than that he was solvent and I so concluded. I did not have any knowledge of all these other things that appeared subsequently in the bankruptcy proceedings."

This last statement is of no force because nothing affecting the properties or the value thereof, or the amount of his indebtedness at the date of this transaction and not known to Mr. Freeman at that time, was subsequently disclosed in the bankruptcy proceeding.

Mr. Henry Joseph Barceloux testified on page 327 of the transcript of record "that at the time I made this payment to the Peter Barceloux Company about July, 1926, none of my creditors were endeavoring to collect any of the debts which I owed them." The word "payment" is apparently an error, and should be "pledge." The condition of his affairs is fully set forth on pages 372 and 373 of the transcript of record. On page 421 of the record he testified that he was operating an insurance and real estate business in Willows and that the general revenue derived during the year was approximately $12,000.00.

The circumstances leading up to the execution of the pledge agreement of April 27th, 1926, are covered by the testimony of George and Henry Joseph Bar-

celoux, called as witnesses for the petitioner, and is not disputed.

There was some dissatisfaction over the fact that the cash account was diminishing rapidly, and Henry Joseph Barceloux asked the corporation to advance him $3,000.00 to pay Mr. Freeman (R. 304).

A request for the execution of a pledge agreement was made sixty days before the execution thereof (R. 304).

George Barceloux testified that the company had been insisting on Henry making a pledge agreement because all the corporation had prior to April 27th, 1926, was the possession of the certificate of stock, and the pledge agreement was requested because "we just wanted it more explicit—well, stipulating what security was up and stipulating what security we had."

At that time the officers of the company knew that Mr. Freeman and Henry Joseph Barceloux were co-operating for the purpose of collecting the judgment from Mr. Donohoe.

We now come to a consideration of the relations existing between Mr. Freeman and Henry Joseph Barceloux as bearing on the issue of fraud.

Frank Freeman filed an action against Henry Joseph Barceloux and Charles L. Donohoe for an accounting on a partnership existing between them in May, 1914. Judgment was entered in favor of Freeman on July 25th, 1921. An appeal was taken. The judgment was affirmed and the remittitur filed on

February 26th, 1924. The judgment was stayed on appeal without bond.

Freeman v. Donohoe, 180 Cal. 170.

Henry Joseph Barceloux did not at any time from the filing of the action in 1914 make any effort to conceal or dispose of his property, or in any other way to avoid the payment of the judgment.

After the filing of the remittitur, Charles L. Donohoe was adjudged a bankrupt.

Mr. Freeman testified that on the affirmance of the judgment, Mr. Barceloux and his attorney stated to him that it was Barceloux's full intention to pay the judgment but wanted his assistance in running down Donohoe to make him pay his half. It was agreed that Barceloux would make substantial payments from time to time on his judgment (R. 401).

Mr. Freeman testified "that agreement was kept and the payments that are outlined in my answer here were made on that judgment."

Other steps were taken by Freeman and Barceloux to realize additional payments on the judgment.

Mr. Freeman also testified "we maintained that agreement in force until the month of June, 1926, at which time I told Barceloux that I could not any longer go along without additional security on that judgment. I already had a judgment lien on the ranch in Lake County." "I asked him to give me a trust deed on that property" (Transcript of Record 413).

Mr. Freeman does not claim that at this time he had no knowledge of the indebtedness and the pledge of the stock to the Peter Barceloux Company. He testified at page 401 of the transcript of record that he knew that the company had his stock as collateral for a loan or note of about $24,000.00. Mr. Freeman had been furnished with a statement showing an indebtedness in about this amount.

Mr. Barceloux testified that commencing with the affirmance of the judgment and until some time in 1926, Mr. Freeman had direct knowledge of all of his properties and assets and that he had kept nothing from him; that he knew everything (R. 372).

Also that on numerous occasions while they were negotiating for the assignment of his interest in the Peter Barceloux Company stock he told Mr. Freeman that he owed the Peter Barceloux Company a considerable sum of money (R. 374).

This is also corroborated by the testimony of Mr. Freeman that his reason for not placing the amount of the indebtedness from Barceloux to the Peter Barceloux Company in the receipt which he was asking the Peter Barceloux Company to sign was probably because of his communication with Mr. Ware about the whole matter, and there was something else to be considered. He testified "I think probably there were other obligations which he owed the Peter Barceloux Company which were to go in the notice of assignment and I understood that" (R. 412).

This conclusively disproves the assertion that Mr. Freeman was acting under the impression that the

total indebtedness of Henry Barceloux to the Peter Barceloux Company did not exceed $24,000.00.

Mr. Freeman also testified that he knew generally what the Peter Barceloux Company assets were (R. 416).

On cross-examination he repeated the statement that the amount of the assignment was left blank because he expected that the true amount of their indebtedness would be inserted in the document (R. 410).

This is further emphasized by the letter of Messrs. Ware & Ware addressed to Mr. Freeman on July 2nd, 1926, in which they stated "the amount of the advances not evidenced by notes of H. J. Barceloux we were unable to supply due to the fact that Mr. George Barceloux stated that it would take some little figuring to ascertain the amount as of the date of the certificate of the secretary. We told him to ascertain that amount and fill it in in the blank for that purpose."

In the face of this testimony it cannot be seriously contended that Mr. Freeman acted on the assumption that the indebtedness due the respondent was a note for $24,000.00.

In June, 1926, Mr. Freeman requested Henry Joseph Barceloux to give him a trust deed on the Lake County property as cumulative security, although his judgment was at that time a lien on that property. This request was made, as he testifies, so that he could make the sale to satisfy his demand under a trust deed rather than the judgment (R. 401).

Henry Joseph Barceloux furnished Mr. Freeman with a complete statement of his assets and liabilities as of June 24, 1926, so that Mr. Freeman, after investigation, could select therefrom properties to be turned over to him as additional security (R. 411).

It must be borne in mind that all of the parties involved in this transaction were on amicable terms, and that Mr. Freeman was undoubtedly familiar with all of the affairs of Henry Joseph Barceloux.

There is no testimony that the statement of assets and liabilities was incorrect.

He went to the various banks which held the stocks as collateral to ascertain the amount of the indebtedness against them. Mr. Freeman testified, "I told him I did not want those things anyhow because of the fact that they were hypothecated for large amounts, but I would prefer to have the Peter Barceloux Company stock" (R. 402).

We have already referred to his testimony that, after making a complete investigation of the assets and liabilities of Barceloux and taking his values, "I could not conclude other than that he was solvent and I so concluded". His statement that he did not have any knowledge of any of those things that appeared subsequently in the bankruptcy proceeding is of no significance, because nothing appeared in the bankruptcy proceeding showing any inaccuracy in the statement furnished by Barceloux.

Mr. Freeman was undoubtedly as familiar with the values of the property as Mr. Barceloux, and it cannot be fairly assumed that Mr. Freeman would act on

a value fixed by Mr. Barceloux, unless he was satisfied because of his knowledge of properties and the investigation he made before acting.

Can it be contended that Mr. Barceloux is to be treated as solvent for the purpose of sustaining the Freeman assignment, and as insolvent for the purpose of defeating the Barceloux pledge, when, it is neither asserted nor proven, that there was any difference in the condition of his property and the value thereof at the date of the pledges in question and at the date of the Freeman assignment (R. 412).

An effort is made to give the impression that Barceloux did not keep faith with Freeman in endeavoring to collect the Donohoe judgment, but Mr. Freeman testifies that such is not the fact (R. 413).

He testifies further that "during all of these times as far as I knew I was the only creditor of Henry Barceloux that was acting at all in endeavoring to collect anything against him". Also that "all of the time I was cooperating with Henry in an effort to collect my judgment as best I could" (R. 614).

Upon the completion of the investigation by Mr. Freeman and at his request, Henry Joseph Barceloux executed an assignment of the Peter Barceloux Company stock to Mr. Freeman, which assignment expressly provides that it is subject to the pledges of the Peter Barceloux Company now questioned in this action.

The only point on which the parties did not agree, was the request of Mr. Freeman that the company should execute to him a writing whereby it would give

him notice of the sale of the property under the pledge, and agreeing that it would not foreclose the pledge against the property without giving him at least ninety days' notice.

Acting within its legal rights the company refused to agree to defer the sale of the pledged property for ninety days. The refusal did not result in any controversy between the parties.

On June 30th, 1926, Mr. Freeman served on the respondent a notice that the stock had been transferred to him and attached the following to the notice:

> "As Secretary of the above mentioned Peter Barceloux Company I acknowledge receipt of the above notice and certify that such Company has no notice of any lien or charge affecting the stock referred to in said notice, other than a lien in favor of said Company for the sum of $.....
>
> .....
>
> Secretary of Peter Barceloux Company, a corporation."

During the period of time covered by the transactions pertaining to the pledge of April 27th, 1926, Mr. Freeman was investigating the affairs of Henry Joseph Barceloux. Among his properties was the Aden Ranch in Lake County, California, which according to the testimony of George Barceloux was purchased in 1917 for $58,000.00 and thereafter extensively improved. (R. 344).

Henry Joseph Barceloux testified that in his opinion the ranch was worth $125,000.00, subject to a mortgage of $30,000.00.

Mr. Freeman testified that he was familiar with the ranch and made an investigation of its market value, and from such investigation concluded that the value was $60,000.00 or $65,000.00.

At Mr. Freeman's request, Mr. Barceloux executed and delivered to him a deed of trust on this property to secure the payment of his judgment.

Mr. Barceloux offered Mr. Freeman as security the Pacific National stock, the Glenn County Garage stock, and bank stock, but Mr. Freeman declined that offer (R. 375).

This testimony of Mr. Barceloux was not disputed by Mr. Freeman.

The pledge of these stocks on June 29th, 1926, was made after Mr. Freeman had made his selection of securities.

As a result of these various transactions, Henry Joseph Barceloux's two principal creditors, the Peter Barceloux Company and George R. Freeman, were satisfied. As Mr. Freeman expressed it on the witness stand, "I took the assignment of contract upon the Lake County ranch and to the Peter Barceloux Company stock at the same time because I wanted ample security for this obligation" (R. 416).

Mr. Freeman fully understood that the corporation was standing on its rights as pledgee because it refused to enter into an agreement whereby it would be bound to give him ninety days notice, before exercising its right of sale under the pledge agreements.

There was no interruption in the amicable relations of all of the parties involved in these transactions and

Mr. Freeman and Mr. Barceloux continued to cooperate together. In fact, Mr. Freeman was acting as attorney for Mr. Barceloux in some matters.

He testifies that he did not receive any notice of sale under the pledge agreement and states "my first actual knowledge of the sale of said stock was in the month of September, of the year 1926" (R. 410).

Even, after learning of the sale of the stock in September, 1926, no question was raised by Mr. Freeman in connection with the pledges. The filing of this action was the first attack made on these pledges. In November, 1926, Mr. Freeman issued an execution on the judgment and levied on all of the properties of Henry Joseph Barceloux (R. 375). The bankruptcy proceedings followed.

The entire course of conduct of Mr. Freeman conclusively establishes, that he had full and complete knowledge of the pledges, and that they were not regarded as being a violation of any agreement between himself and Henry Joseph Barceloux.

Beginning on page 10 of petitioner's brief certain transactions are discussed on the theory that they are an indication of a plan to defeat the creditors of Barceloux.

The first and complete answer to these discussions is that the Peter Barceloux Company was in no way connected with any of the transactions mentioned. All of them occurred after the execution of the pledges to the respondent and the deed of trust and assignment to Mr. Freeman.

These pledges cannot be invalidated without the finding of an actual fraudulent intent on the part of the respondent.

It requires no argument to demonstrate the proposition that the acts of the bankrupt with third persons and with which the respondent had no connection whatever, subsequent to the execution and delivery of the pledges, are not evidence of any fraud against the respondent. It would be just as logical to attempt to connect Mr. Freeman with these transactions. However, neither he nor the company had anything to do with them.

There is no charge of any conspiracy on the part of the company and Henry Joseph Barceloux to defeat his creditors.

For these reasons, these transactions have no place in the case, and unquestionably cannot be used as evidence against the respondent.

Aside from the foregoing, it must be remembered that all of them took place after Barceloux had entirely satisfied the demands of his two principal creditors.

The first transaction referred to is a conveyance from the bankrupt to his wife on July 7th, 1926, of his equity in some lands stated in the brief to be of the value of $2900.00. There is no evidence sustaining this valuation. On the contrary, the undisputed testimony of Mr. Barceloux shows that he figured the value to be $1,000.00; that the contract, to say the least, was of questionable value. As he expressed it, his interest was very remote, and as it turned out nothing was

received on account of his contracts with Mr. Neilson. It is undisputed that his wife gave him a check for $1,000.00 for his interest; that it was necessary for him to secure the $1,000.00 to pay interest and a power bill. She lost $80.00 on the deal (R. 355-370).

The next transaction mentioned on page 10 of the brief relates to the sale of his qualifying share as a director of the Peter Barceloux Company for $10.00. There is nothing unusual in this transfer, as he was retiring as a director of the corporation. The statement that the Peter Barceloux Company took securities for more than three times the value of its indebtedness is hardly consistent with the claim of petitioner that Mr. Barceloux was bankrupt at the time of the pledge. This is particularly true, when Mr. Freeman admits in his testimony that the value of the Lake County ranch was $35,000.00 in excess of the mortgage.

On page 11 of the brief the attention of the Court is directed to a transaction between the bankrupt and Mrs. Gelinas whereby Mrs. Gelinas took over certain bank shares subject to an indebtedness.

The statement in the brief is incomplete and misleading. The Court will note that this transaction was on August 24th, 1926, after Mr. Barceloux had satisfied both Freeman and the corporation. He was indebted to two banks which were threatening to foreclose his collateral. He asked his sister, Mrs. Gelinas, to take over the loan. She did so. The indebtedness on this stock was $13,800.00. She paid Mr. Barceloux $2000.00 in cash. In addition thereto, she was compelled to give the bank more collateral

to prevent a foreclosure against the securities (R. 390-393).

It is quite surprising that this should be mentioned as an indication of fraud on the part of the bankrupt in view of the testimony of Mr. Freeman, that he had been furnished with a statement of this loan and the security by the bankrupt and refused to accept it, after making a personal investigation to ascertain the conditions existing at the two banks (R. 402-411).

Mention is also made in petitioner's brief on page 11 of a transaction whereby the Peter Barceloux Company assumed the debts of the bankrupt in the amount of $16,000.00 owing to the Crocker National Bank. The same condition exists with reference to this loan.

Mr. Freeman testifies on page 411 of the transcript that Mr. Barceloux authorized Mr. Freeman's representative to go to the Crocker bank and get a proper statement, and that he knew that Barceloux owed this $16,000.00 which was secured by bank stock (R. 411-412). The reason the company took over this loan is explained by Mr. George Barceloux on page 196 of the record. The company was borrowing money from the Crocker National Bank, and in order to maintain its credit took over this loan at the suggestion of that bank. The company made a loss of $16,000.00 on the transaction (R. 196, 197, 206, 207, 377). This transaction is uncontradicted.

The reference on page 12 to the transfer of certain personal property to the attorney was long after the pledge to the respondent and in no way connected therewith. It was also after Mr. Freeman had levied

his execution. His financial condition at this time was entirely different from that when he made the pledges to the respondent, and the assignment and deed of trust to Mr. Freeman.

At this point we wish to refer to the statement in the dissenting opinion that Certificate No. 12 bears a feigned date and must have been antedated so as to place it before June 30th, 1926 (R. 469).

Certificate No. 12 was not in existence at the date of the pledge.

As alleged in the complaint (R. 4), Certificate No. 5, which was issued to Henry Joseph Barceloux at the time the company was incorporated, is the certificate that was included in this pledge.

Certificate No. 12 was subsequently issued.

Again this Certificate No. 12 is referred to in the letter from Ware & Ware to Mr. Freeman (R. 406).

There is no allegation in the pleadings and no evidence that this certificate was not issued on the day it bears date. No such question was raised in the trial Court. No such question was raised by the pleadings. Mr. Freeman never questioned it. Furthermore, there was no reason to antedate this certificate because as is admitted by the pleadings and proof, Certificate No. 5 was transferred by the pledge agreement of April 27th.

We have already referred to the testimony of Mr. George A. Barceloux that he had heard of the negotiations between his brother and Mr. Freeman before the execution of the deed of trust and assignment to Mr. Freeman.

THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE FINDING OF THE CIRCUIT COURT OF APPEALS THAT THERE WAS NO FRAUD, AND IS WHOLLY INSUFFICIENT TO SUSTAIN THE FINDING OF FRAUD MADE BY THE TRIAL COURT.

In *Varner v. New Hampshire Savings Bank,* 240 U. S. 617, 60 L. Ed. 829, this Court held that even where there is a sharp dispute in the testimony, if the evidence sustains the conclusions reached by the Circuit Court of Appeals, the judgment entered there will be affirmed.

Section 3432 of the *Civil Code of California* provides that "a debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another".

> "It is only where the transfer was made with intent to delay or defraud any creditor that it can be attacked".
>
> *Civil Code,* Section 3439.

In *Heath v. Wilson,* 139 Cal. 366, it is held that these provisions of the Civil Code do not affect the power of a person, although insolvent, to transfer property in this state, in good faith to a particular creditor, for the purpose of paying or securing the whole or a part of the debt owing to such creditor.

Dana v. Stanford, 10 Cal. 278, is cited with approval.

Justice Field declares in that case, that from the very power which a man possesses over his own property, it follows that he can dispossess himself of it in any manner he may see fit which does not

contravene the general policy of the law; that it is no part of such policy to inhibit its application to the payment of one debt rather than another; also, that a conveyance giving such preference is not fraudulent, though the debtor may be insolvent, and the creditor be aware at the time, that it will have the effect of defeating the collection of other debts; that a creditor violates no rule of law when he takes payment or security for his demand though others are thereby deprived of obtaining satisfaction for their equally meritorious claims.

In response to the suggestion that because the corporation was unable to pay its debts as they became due, it was insolvent, the Court in the *Heath* case holds that such fact alone does not make the sale fraudulent, nor raise a presumption of fraudulent intent.

We quote the following from *McKee v. Title Insurance, etc. Co.*, 159 Cal. 217, in answer to the point that the value of the securities exceeds the amount of the indebtedness:

> "In every case where a person who is indebted borrows less money than the sum of all his debts and secures the lender by a first mortgage on all his property, the lender intends to hinder and delay the other creditors so far as may be necessary to make his mortgage a first lien. But such hindrance and delay is legitimate and lawful and does not constitute fraud."

Throughout the brief of petitioner the testimony of Henry and George Barceloux and Mrs. Gelinas is relied upon where it suits the purposes of peti-

tioner, while in other portions of the brief it is argued that their testimony is to be rejected.

To sustain the allegations of fraud, petitioner called these parties as his witnesses. The only other witness called was Mr. Freeman.

Section 2055 of the *Code of Civil Procedure* of the State of California, providing that a party calling and examining as a witness an adverse party shall not be bound by his testimony, does not mean that such testimony may not be given its proper weight, but simply as it declares, that the party calling such witness shall not be precluded from rebutting his testimony, or from impeaching the witness. In other words, such testimony is to be treated as though given on cross-examination.

This was also decided in *Figari v. Olcese,* 184 Cal. 775, on the authority of the decision of this Court in *Dravo v. Fabel,* 132 U. S. 487.

The testimony of these witnesses stands uncontradicted and unimpeached. In fact the trial Court did not disregard the testimony, but accepted it as true, and then deduced the inference of fraud. There is no conflict between the testimony of Mr. Freeman and the other parties on any material point. Mr. Freeman and Mr. Barceloux only differed as to whether Freeman was informed that the indebtedness to the respondent was $24,000.00.

In view of the fact that one of the notes was for $24,000.00, there may have been some confusion on the subject. However, from the testimony we have heretofore mentioned, it is clear that Mr. Freeman

knew that there were obligations other than the $24,000.00, because he left the amount of the indebtedness blank in the document prepared by him and to be executed by the respondent.

If we disregard the testimony of every witness except Mr. Freeman, there is no evidence to sustain a finding of fraud.

It is undisputed that the pledges were made for a valuable consideration.

Without the testimony of George and Henry Barceloux and Mrs. Gelinas, the record would consist of the testimony of Mr. Freeman and the documentary evidence.

The burden of proof is, of course, on the petitioner.

Nothing in Mr. Freeman's testimony deals with the transaction between Barceloux and the company.

We would then have the situation of writings, unimpeached. The presumption of consideration and fair dealing would require a judgment in favor of the respondent in the absence of testimony to the contrary.

We agree with the following statement quoted from page 67 of the petitioner's brief:

> "There is no conflict in the facts or the sequence of the various transactions between the bankrupt and the respondent company, but the only conflict, if any, is in the inferences that may be deduced from these facts".

Under the authorities, this is a concession that the evidence is insufficient to sustain the finding of the

trial Court, much less to upset the finding of the Circuit Court of Appeals.

This is not the case of witnesses contradicting one another. The witnesses agree as to what was done. As stated by petitioner, it is a question of whether or not the Court is justified in drawing an inference of fraud from the acts of the parties.

With the record in this state, it was the express duty of the Court to draw the inference of fair dealing.

In *Ryder v. Bamberger,* 172 Cal. 800, an action for fraud, plaintiff appealed from a judgment in favor of the defendant asserting that the evidence was insufficient to sustain the finding in favor of defendant.

Petitioner admitted that the question was one of inferences to be drawn from the testimony. In upholding the trial Court, the Supreme Court of California very tersely stated the rule in the following language:

> "For, if there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of the Court or jury to draw the inference favorable to fair dealing".

Also,

> "For fraud must always be proved so that when the plaintiff's case goes no further than to establish a state of facts from which the inference of fraud may or may not be reasonably drawn, he has failed to establish his charge by

> a preponderance of the evidence, and it becomes the duty of Court or jury, as has been said, to find in favor of innocence and uprightness".
>
> *In re: Williams,* 286 Fed. 138.

All of the facts relied upon were of an open and notorious character, consisting of writings and transactions had with the knowledge of all the parties in interest. The failure of plaintiff to produce any evidence contrary thereto, must be taken as confirmatory of the testimony of the witnesses.

Ventre v. Tiscornia, 23 Cal. App. 603;
Entwisle v. Seidt, 155 Fed. 864.

The same rule is followed in the federal Courts.

In re: Brown, 199 Fed. 356;
In re: Hawks, 204 Fed. 310.

THE CIRCUIT COURT DID NOT ERRONEOUSLY CONSTRUE SECTION 70e OF THE BANKRUPTCY ACT; NEITHER IS A MONEY DECREE FOR THE VALUE OF THE PROPERTY THE ONLY OR PROPER RELIEF.

In support of the contention that the Circuit Court of Appeals erroneously construed Section 70e, petitioner has quoted an excerpt from the decree on page 18 of the brief, reading as follows:

> "The trustee in bankruptcy acting for the creditors has no right of election".

This statement must be considered with reference to the subject under discussion by the Circuit Court.

Beginning at page 460 of the record, the opinion takes up a discussion of the authority to enforce the rights of creditors under Section 70e.

In accordance with the uniform weight of authority, this section simply authorizes the trustee to enforce the rights of creditors in accordance with the laws of the state applicable to the transaction.

The transfer having been made more than four months prior to bankruptcy, this section, as construed by this Court, gives the trustee in bankruptcy a right of action to recover property transferred in violation of the state law.

The Circuit Court of Appeals then considers the law of the State of California with reference to the right of a creditor to attack a conveyance on the grounds of actual fraud under Section 3439 of the *California Civil Code.* As the Circuit Court of Appeals stated, the question for consideration is "whether or not it is proper to enter a judgment for the value of the property transferred where that property is subject to the jurisdiction of the Court".

It is unnecessary to review the cases cited in the opinion.

The remedy of this trustee is the same as that of a creditor under the California law.

The subject is thoroughly discussed in the case of *Scales v. Holje,* 41 Cal. App. 734, from which we take the following quotation:

> "The plaintiff as trustee in bankruptcy is in no better legal position than the creditors whom he represents. There is no claim made that any of the money was paid to Holje within four months of the bankruptcy. 'When the trustee seeks to avoid a fraudulent or any avoidable transfer by the bankrupt antedating the four months, he does so, not in the right conferred

> as a concomitant to the due operation of the system, but exclusively in the creditors' common law right. He is, with relation to these anterior transfers, so to speak, subrogated to that right. Such of these anterior transfers as any creditor might have avoided, he may avoid. *Such as no creditor could have avoided, he cannot avoid'.*"

While the bankruptcy act clothes the trustee with authority to maintain the action, still his cause of action is not covered by the bankruptcy statute, nor the federal laws, but by the state law. The language of Section 70e that "a trustee may avoid any transfer by a bankrupt of his property which any creditor of such bankrupt might have avoided" means "which any creditor might have avoided" under the laws of the state where the transaction occurred.

Manders v. Wilson, 230 Fed. 536.

Suits for the recovery of property fraudulently conveyed by the bankrupt are not proceedings in bankruptcy, but controversies at law or in equity.

In re: Vadner, 259 Fed. 638.

The right of a trustee in bankruptcy to avoid a fraudulent transfer depends upon the law of the state in which the property is located.

McMullen v. Zabawski, 283 Fed. 552.

The Circuit Court of Appeals simply defined the right of action possessed by the trustee under the state law.

The cases cited in the opinion and in this brief conclusively show that under the law of California, the remedy is the return of the property where it is

available, and that a personal judgment was not necessary or justified. In other words, full and complete relief can be given to the plaintiff by the return of the certificates of stock in question, and requiring respondent to account for any dividends or profits derived from them.

The respondent has received nothing by reason of this transaction, except the certificates of stock, leaving out of consideration the few shares sold. No other money has come into its hands.

By this judgment, the petitioner's recovery is not confined to the value of the stock at the time of the transfer, but its highest value between the date of the transfer and the audit. It would seem to require no argument to demonstrate that in a Court of Equity the plaintiff will not be permitted to profit by the litigation. He should have no greater rights than the bankrupt.

The judgment in this and the companion case of Gelinas, if collected, will exceed all of the indebtedness of the bankrupt and leave a balance in his favor.

The situation is somewhat analogous to that presented in the case of *Off v. Hakes,* 142 Fed. 364. In that case a merchant sold his stock of goods within four months before the commencement of proceedings in bankruptcy. The purchaser assumed the indebtedness of the retiring firm and as part of the purchase price gave his note for $964.52. This note was turned over to a creditor of the merchant. An action was filed to recover the amount of the note as an alleged preference. The trustee was awarded a decree for the

money. It was reversed, because under equitable principles, the petitioner not having been paid the amount of the note constituting the alleged preference, the equitable remedy was to direct the surrender of the note, and not judgment for its assumed value.

The plaintiff, having invoked the power of a Court of Equity to assist him in subjecting his property to the debt, cannot complain if he is given the right to satisfy their claims from the property fraudulently transferred.

Upon the subject of the election, the Court holds "The substitution of the value of the property for the property itself is not a right of the plaintiff unless and until it is determined that the property itself cannot be subjected to his claim, in which event a Court of Equity will remedy the defect so far as may be done by substituting for the property a judgment for its value" (R. 464).

Following this quotation is the paragraph from which the petitioner excerpts the statement that the trustee has no right of election.

The Court was considering the right of an owner of property to bring an action for its conversion under the laws of California. It is then pointed out that a trustee in bankruptcy acting for the creditors has no such right of election. This statement must be taken in connection with the California authorities, that in an action in equity to decree a fraudulent conveyance void, equity will direct the return of the property unless it has been sold, unless that kind of relief is rendered impracticable by the defendant.

As stated by the Circuit Court of Appeals, the cases cited by both parties in that Court are in accord with its decision.

The rule is correctly stated in the quotation from *Connecticut Fire Ins. Co. v. McNeil,* 35 Fed. (2d) 675, cited by petitioner in the Circuit Court and reading as follows:

> "If a court of equity obtains jurisdiction of a suit *for the purpose of granting some distinctively equitable relief* * * * and it appears from the facts disclosed on the hearing, but not known to the plaintiff when he brought his suit, * * * that the plaintiff was entitled to the only alternative relief possible of damages, the court there may, and generally will, instead of compelling the plaintiff to incur the double expense and trouble of an action at law, retain the cause, decide all the issues involved, and decree the payment of mere compensatory damages" (italics ours).

Assuming for the sake of the argument that the title was vested in George A. Barceloux at the time of the filing of the complaint, still it appears by the allegations of the bill of complaint that he purchased the property with notice of the fraud.

Under this theory of the case, petitioner was entitled to maintain an action against George A. Barceloux, as well as the corporation for the recovery of the stock.

The decree therefore cannot be justified by the above rule because the facts were known to the petitioner at the time of the filing of the complaint and

were not first disclosed at the trial, and the Court can grant full and complete relief without resort to the alternative remedy of damages.

In this case we have the amazing situation of a judgment of $106,582.59, the highest value of the property between the dates mentioned, based on a bill alleging the value to be $82,100.00, and praying for judgment for so much thereof as exceeds the claim of the former defendant Freeman under his assignment.

We repeat, that the trustee in his bill recognizes the validity of the assignment made to Freeman under the same surrounding circumstances, and asks for judgment for the value of the stock, less the amount due Freeman. He has recovered the highest market value of the stock. To say that such a judgment can stand in a Court of Equity is to disregard every principle of equity and fair dealing.

An effort is made to sustain this judgment by citing the cases of *Schainman v. Dean,* 24 Fed. (2d) 475; *Brainard v. Cohn,* 8 Fed. (2d) 13; and *Oliver v. Brennan,* 299 Fed. 106, on page 19 of the petitioner's brief.

Schainman v. Dean simply declares the general rule that a trustee may sue either in law or in equity, but does not hold that Section 70e in any way limits or controls the rules governing equitable relief.

The petitioner having sued in equity is entitled to such relief as is usually administered by a Court of Equity and no more.

In *Oliver v. Brennan,* the only proposition involved was that the decree was too uncertain and indefinite.

In *Brainard v. Cohn,* the trustee sought a money judgment because the property had been mixed and confused beyond possible identity with the properties of the defendant. This is in recognition of the rule that it is distinctly alleged and proven that the property was not available by reason of such confusion.

Counsel are in error in arguing that the right of the trustee depends solely upon the bankruptcy act (Brief page 20).

As we have shown, the right of the trustee is that of a creditor under the law of the state.

It has not been contended that the recovery of the trustee is limited to the right of a single creditor. The rule is, that the trustee in an action to invalidate a transaction made more than four months prior to bankruptcy, has the same rights as a creditor or creditors under the state law. The trustee has no greater or additional rights.

It is well settled that in an action of this kind, to set aside a transfer on the ground of fraud, equity will direct the return of the property if available, and if not the value thereof.

The Bankruptcy Act does not attempt to define the rights of a trustee or creditor under the state law. That he is exercising the right of a creditor is further recognized by the fact that the state and federal Courts have concurrent jurisdiction of such action.

There is no suggestion as argued on page 23 of the petitioner's brief that a Court of Equity can do nothing more than to decree the title vested in the bankrupt, and that two actions would be necessary.

The remedy is not the choice of the transferee, but rests wholly with the Court.

The logical effect of the argument of petitioner, is, that a trustee in bankruptcy has the right to limit and control the remedy to be administered by a Court of Equity.

Aside from the foregoing, this trustee having elected to file his bill in equity, the relief is unquestionably controlled by the well settled principles of equitable relief.

This question was before this Court in *Dunphy v. Kleinschmith,* 78 U. S. 610; 11 Wall. 610. That was a creditor's bill to set aside a fraudulent mortgage. The bill prayed that the mortgage be declared void and a receiver appointed to dispose of the property and satisfy the claims of the creditors. Plaintiff was awarded a money judgment in the sum of $35,737.00. The case was reversed on the ground that it was a case of chancery jurisdiction and one requiring equitable, as distinguished from legal relief. We quote the following from the opinion:

> "Again, in an equitable proceeding of this kind a decree in the nature of a judgment for damages cannot be rendered against the defendant who is alleged to have taken a fraudulent assignment of the property. The decree against him must be a *decree* for an account. He must be called to account for just what property has

come into his hands, and no more; and he will be entitled, under ordinary circumstances, to a rebate for the amount that was justly and honestly his due. The mode of taking such an account is well known in equity proceedings. The defendant is to exhibit an account either in his answer or in the master's office, and if it is not satisfactory to the complainant, it may be surcharged or falsified, and as the account is finally found to stand, so will the responsibility of the defendant be. But if the complainant wishes to make him answerable in damages, either for the waste of the property or for its disposal by the original proprietor by aid of the wrongful complicity of the defendant, he must sue for damages in an action at law.

No account of the kind, or in the manner indicated, seems to have been taken at all. The suit was tried like an action for damages, and the jury were left to say, in brief, whether or not the complainants could have made their money on execution had it not been for the mortgage and assignment to the defendant. The jury answered that they could, and the defendant was made personally liable for the whole amount."

Dunphy v. Kleinschmith was overruled, as to the point decided with reference to the practice of federal and territorial Courts in *Hornbuckle v. Toombs,* 85 U. S. 648, but not on the question of equity jurisdiction.

The Hornbuckle decision declares the familiar rule that the laws regulating the proceedings of the United States Courts are of specific application and locally inapplicable to the Courts of the territory.

If, as argued by petitioner, the property was sold and ownership was not in the corporation, then the remedy was an action at law for damages and not in equity.

In *Dunphy v. Kleinschmith* the property had been transferred and it was found in the possession of Dunphy under a common assignment which prima facie gave him the legal title. It is charged that this was a fraudulent contrivance to hinder and delay the creditors. Being an equitable proceeding, and the property being in the hands of the defendant, it was held that money damages could not be awarded.

It appearing by the allegations of the complaint, that George A. Barceloux was a participant in the fraud, he was not a bona fide holder and it inevitably follows that the plaintiff's remedy was to elect either to sue at law for damages, or to sue in equity for the recovery of the property from the respondent or George A. Barceloux, its vendee.

In equity, the defendant must be called to account for the property that has come into his hands and no more. If the complainant wishes to make him answerable in damages either for the waste of the property or for its disposal by the original proprietor, he must sue for damages in an action at law.

The petitioner failed to establish a case in equity. There can be no jurisdiction on the theory of accounting because there were no accounts between the parties. The only suggestion of the necessity for an accounting is to ascertain the value of the shares of stock. This could be done in an action at law.

Appellee having affirmed the transaction and sought recovery of damages, his cause of action is one arising in tort and cannot be converted into one for accounting.

United States v. Bitter Root Development Co., 200 U. S. 457.

If the fraudulent grantee has concealed or disposed of the property conveyed to him, or mingled it with his own property in such a manner that the creditors cannot reach or identify it, a decree may be rendered against him for its proceeds or value.

27 *Corpus Juris,* 855.

Bearing in mind that the distinction between equity and law in federal Courts is jurisdictional, the point is, that a Court of Equity has no jurisdiction to render judgment for damages, except under the conditions stated, but should require defendant to account for the property received. There is no question as to the ability of the respondent to return this stock, or of the power of the Court to direct its return and to require an accounting, as prayed for in the bill.

There can be no question as to the soundness of the opinion of the Circuit Court of Appeals that the petitioner cannot complain, if he is given the right to satisfy his claims, from the property fraudulently transferred, but petitioner is asking more than this. The property is in the possession of the respondent who has received no money thereon.

Instead of receiving that which the respondent received, the petitioner is given a money judgment not

for the value of the property at the time of the pledges but for its highest market value.

It is therefore clear, that in so holding, the Court has not placed any limitation on the power of the trustee to elect.

The opinion deals with the question of the relief to be granted to the trustee after he has elected and filed a bill in equity.

In the dissenting opinion it is stated that no seasonable objection as to the jurisdictional facts was made (R. 466).

We respectfully call attention to the fact that on the filing of the interlocutory decree, and while the whole question still remained within the control of the trial Court up to the entry of the final decree, the respondent at the first opportunity, which was on the filing of the Master's report, filed a notice of motion to vacate and set aside the interlocutory decree and to reopen, rehear and reconsider and decide and determine the case. One of the grounds urged in the motion was that this being an action in equity, the Court could not award a judgment for damages, but should direct the return of the stock (R. 91).

Accompanying this motion was points and authorities citing cases sustaining this point. This motion was denied (R. 101).

In re: Wright Motor Co., Inc., 299 Fed. 106, cited in the opinion, a money judgment was ordered because the action was to recover moneys unlawfully

withdrawn from the corporation by manipulating its assets.

There was no dissent between the Judges of the Circuit Court on the proposition that this is an action under the state law. So, it does not involve the Bankruptcy Act as argued by petitioner, but as stated, the relief is governed wholly by the California law relating to an action by a creditor to set aside a fraudulent conveyance which obstructs the collection of his debt.

It cannot be doubted that the decision of the Circuit Court of Appeals for the return of the property which is available, is within the well settled principles of equity jurisdiction. This would restore the parties to their original position.

As stated, the judgment entered in this action goes beyond the principles of equity jurisdiction because it awards more than the value of the stock at the time of the transfer, and also requires the respondent to pay money when it has received no money on account of the transaction, instead of restoring the property.

The Circuit Court was not deciding the right of election on the part of the trustee, but was dealing with the question of what relief should be granted in a Court of Equity.

Furthermore, it would seem that the question is not involved in the matter, because the reversal was ultimately based on the finding that there was no fraud, and that the pledge was valid. If the Court had sustained the finding of fraud and reversed the

case on the ground that plaintiff should take the property and not damages, the question might be involved.

The Court has decided that the judgment was erroneous, but in the last analysis the finding that the transfer was not fraudulent should govern the disposition of the case.

It cannot be denied that, if the petitioner is entitled to prevail, that a decree directing the return of the stock, or for the value thereof in the event of the inability of respondent to return it, is equitable and would restore to the creditors of Henry Joseph Barceloux all that he possessed. The creditors are not entitled to profit, particularly in view of the fact that the law of California justifies a creditor in taking a preference.

THE CIRCUIT COURT OF APPEALS DID NOT TAKE ANY NEW EVIDENCE.

That part of the decision directing the sale of the stock was not based on the introduction of the certificate in evidence in the Circuit Court of Appeals, but was prompted by the desire of the Court and the respondent to end the litigation. All of this was to the advantage of the petitioner.

In the absence of any offer by the respondent, the decree was within the issues and is fully supported by the evidence. It directs the sale of the property and the disposition of the proceeds in accordance with the rights of the parties interested in the stock, to-wit: the right of the trustee as the successor in interest of

the bankrupt, the right of the respondent under its pledge, and the right of Freeman under his assignment subject to the pledges.

At the trial, George A. Barceloux testified that all of the securities had been transferred to the respondent prior to the trial and his note returned. This evidence is uncontradicted.

Therefore, the Court was dealing with a situation where the securities in question were in the possession of the corporation and that it had the legal title thereto.

The Court could have entered a judgment directing the sale of the securities if they were on hand, or if not, that the petitioner have a money judgment for the value thereof. This is the effect of the decision of the Circuit Court of Appeals.

The petitioner cannot complain because of this feature of the decree.

As to the stock not on hand, it is directed that the respondent credit the value thereof as fixed by the Master on the indebtedness secured by the pledges before making the sale. This is in excess of the amount actually received by the company for the stock because the Master found the highest value.

If the Court had reversed the judgment without any directions, then the respondent could have sold the property included in the pledges attacked in this action without demand or notice because of the waiver of demand and notice in the pledge agreements. The petitioner cannot complain of the directions that the trial Court should control the sale by fixing the time,

place and terms of sale of the stock and the application of the proceeds.

If the rights of any one are limited or restricted by the terms of the decree, it is the rights of the respondent and not the petitioner.

As the record clearly shows, no new evidence was received by the Circuit Court of Appeals, and its decree is supported by the record of the trial Court regardless of the offer made by the respondent in the Circuit Court. No tender of the stock in the Circuit Court of Appeals was necessary.

As shown by all of the authorities, it appearing that the securities were in the possession of the respondent, the Circuit Court unquestionably could direct the entry of a judgment that the stock be sold, or if not available, the value thereof be paid to the plaintiff.

It is very clear from the whole record that the petitioner is not seeking the return of this stock because he prefers to collect the money award representing its highest value rather than to take the stock itself. In other words, the petitioner is seeking the inequitable advantage of recovering not the stock but a profit, not actually received by respondent but based on a temporary increase in the value of the securities after the transfer.

No one will deny that under the condition of the company shown by this record that the enforcement of this judgment representing a one-fourth interest in the corporation will bankrupt it.

THE DECISION OF THE CIRCUIT COURT OF APPEALS ONLY DETERMINES THE RIGHTS OF THE PARTIES TO THE ACTION AND DOES NOT IN ANY WAY ATTEMPT TO ADJUST THE PRIORITIES OF THE CREDITORS OF THE BANKRUPT.

Again referring to the fact that by the bill, the petitioner only asked for judgment for the value of the property as of August 16th, 1926, less such sum, if any, as might be due to Mr. Freeman under his assignment, inevitably in view of these allegations of the bill, the judgment of the trial Court cannot stand because it awards the petitioner judgment for the whole value, and not the value less Mr. Freeman's demand.

Inasmuch as the Court directed the sale of the property to the advantage of the petitioner as stated, a direction as to the disposition of the proceeds was an indispensable part of the decree.

This transfer was made more than four months prior to bankruptcy.

Under the directions of the Court any proceeds of the sale would come into the hands of the plaintiff as an asset of the bankrupt's estate. Upon receipt of that money, then the Bankruptcy Court would adjust the priorities of the creditors.

The case of *Globe Bank & Trust Co. v. Martin*, 236 U. S. 288, cited on page 41 of petitioner's brief, sustains this decree.

The Court has not made any attempt to control the Bankruptcy Court in the disposition of the moneys which may come into the hands of the trustee.

Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734, also cited on the same page, deals with the power of the Court where the validity of the lien is conceded.

In *Hiscock v. Varick Bank,* 206 U. S. 28, this Court held that the Bankruptcy Court is not empowered to direct the disposition of the pledge or the ascertainment of its value where the parties had failed to do so by their agreement. It is only when the securities have not been disposed of by the creditor in accordance with his contract that the Court may direct what shall be done in the premises.

To the same effect is the case of *Griffin v. Smith,* 177 Cal. 482, holding that where a pledge is created more than four months before the filing of the petition in bankruptcy its validity was in no way affected by the bankruptcy proceeding. That was an action to foreclose a pledge agreement which provided that the pledged property could be sold at public or private sale with or without notice to the pledgor. Judgment was entered directing the sale of the property. It was held that this right to sell could be exercised without resort to any Court, and was not affected by the bankruptcy proceedings. The decision is based on *Hiscock v. Varick Bank,* supra.

The Court having held this pledge to be valid, the trustee in bankruptcy has no power or authority to sell this property as suggested on page 40 of the petitioner's brief, because that power is vested in the respondent under the law, and particularly under its pledge agreements.

The pledge agreement being valid, the respondent has the legal right to sell the property to satisfy its

demand, and the only relief to which the petitioner is entitled is the right to receive the surplus after satisfying the pledge of the respondent and the judgment of Freeman secured by his assignment.

THE CIRCUIT COURT OF APPEALS DID NOT DECIDE THAT THE TRUSTEE IS PRECLUDED IN A SUIT ON BEHALF OF ALL THE CREDITORS FROM ASSERTING THAT A TRANSFER WAS FRAUDULENT BY THE FACT THAT ONE OF THE CREDITORS TOOK ADDITIONAL SECURITY WHICH RECITED THE EXECUTION OF THE TRANSFER ASSAILED AS FRAUDULENT.

As stated, this action being based on the proposition that the transfers were made to defraud Freeman, the holding of the Court that the conduct of Freeman in accepting the assignment of the shares subject to the pledges with full knowledge of all of the facts and without questioning the pledge agreement, places him in a position where neither he nor the petitioner suing in the right of a creditor can successfully contend that any fraud existed.

Would any one contend that if Freeman had filed an action to set aside these transfers on the ground of fraud, that he could maintain such action in the face of his conduct?

The petitioner as trustee has no greater right than Freeman in attacking these transfers on the ground that they were made to defraud Freeman.

All of this goes to the question of fraud and the right of a creditor to attack the transfers.

The holding of the Court is epitomized in the statement printed on page 43 of petitioner's brief that:

> "So far as the right of the trustee in bankruptcy is predicated upon the right of Freeman to question the pledge to the company, it cannot be sustained for he cannot complain of the prior pledge to which he assented" (R. 458).

This is far from holding that the trustee is precluded from attacking the transfers on behalf of the other creditors because of the Freeman assignment. That the Court made no such holding clearly appears from the opinion.

Immediately following the above quotation is the statement that:

> "It remains to consider the rights of the trustee as a representative of other creditors existing at the time of the pledge to the company and the sale thereunder."

Attention is directed to the fact that the complaint does not allege the existence of a single creditor other than Freeman, nor that any other creditor was affected by the pledges and the sale.

The decision of the Circuit Court of Appeals does not deprive the trustee of the right of representing all creditors and in no way conflicts with the construction of Section 70e in *Moore v. Bay,* 284 U. S. 4.

It is too late for the petitioner to now assert that this action was prosecuted because the transfers were made to hinder, delay and defraud creditors generally. The evidence disproves this claim.

We have already reviewed the subsequent transfers and called the attention of the Court to the fact that this respondent was in no way connected with the same, and that the properties covered by these transfers were offered to Mr. Freeman as security and he declined to accept the same.

The argument that this action is prosecuted because the respondent Barceloux intended to hinder, delay and defraud the creditors generally is in direct contradiction of the pleadings, the proof and all of the arguments presented by the petitioner in support of his case.

That these pledges were not made to defraud either Freeman or the subsequent creditors is conclusively established by the fact that the bankrupt continued in business until his property was seized under execution by Mr. Freeman in November, 1926, and that during the period of time intervening between the assignment to Mr. Freeman and this levy, Mr. Freeman acted as attorney for the bankrupt and they were still cooperating to work out the payment of the judgment and not to defeat its payment.

The Court will search the record in vain for any suggestion by the respondent during the trial of the action, or in the presentation of the case to the Circuit Court of Appeals that the case was prosecuted on the theory that the pledges were made to defraud any creditor except Freeman.

The decision of the Circuit Court of Appeals on this point is logical and is directed to the point of ascertaining whether or not a case had been made by

the petitioner claiming the same rights as a creditor under the laws of the state.

THE TRANSFER OF THE SECURITIES BY GEORGE A. BARCELOUX IN SATISFACTION OF THE PLEDGE TO THE COMPANY WAS VALID AND IN ACCORDANCE WITH THE LAWS OF THE STATE OF CALIFORNIA.

At the sale to satisfy the pledges, the property was bid in by George A. Barceloux, who executed a promissory note to the corporation and pledged the property purchased as security therefor.

It must be conceded that George A. Barceloux had knowledge of all of the transactions involved in this action.

The argument of the petitioner on this point reduces itself to an absurdity. The bill alleges that the pledgee's sale was fraudulent, irregular and void and prays the Court that it be set aside.

The title of the respondent is based on the pledge and the sale. If no title vested in George A. Barceloux because of the invalidity of the sale, then the title remains in the Peter Barceloux Company, and of course no question arises as to a corporation purchasing its own stock.

If the title to the securities vested in George A. Barceloux, and as the undisputed evidence shows, were in turn pledged by him as collateral security to the respondent, then it is unquestionable that the respondent had the power to accept these shares of stock in satisfaction of the debt. This was not a trans-

fer for the purpose of dividing the assets of the corporation.

There is no conflict in the California authorities on the subject of the right of a corporation to purchase or take its own stock pledged to it as collateral security.

Ralston v. Bank of California, 112 Cal. 208, is a leading case on the subject and is not in conflict with any of the authorities cited in the brief.

The whole subject is reviewed and considered in the case of *Stewart v. Stewart Hotel Co.,* 33 Cal. App. 167, and it is there held that the general rule prohibiting a corporation from purchasing its stock is subject to exceptions, and that in California there is no law in terms forbidding a corporation from buying its capital stock, or that such a purchase is *ipso facto void.*

In that case, the plaintiff's stock was purchased by the use of the assets of the corporation and no question of taking it in satisfaction of a pledge in favor of the company was involved.

In *Stevens v. Boyes Hot Springs Co.,* 113 Cal. App. 479, the corporation executed its promissory note in direct purchase of certain shares of its capital stock.

THIS IS NOT AN ACTION FOR CONVERSION NOR WAS THE RESPONDENT GUILTY OF CONVERSION IF THERE WERE SOME IRREGULARITIES IN THE SALE.

If this is an action for conversion, then a Court of Equity has no jurisdiction of the subject matter there-

of, and could not award the plaintiff a money judgment.

Petitioner recognizes this rule because it is sought to avoid its application by the statement on page 54 of the brief:

> "And since this suit was rightly begun in equity upon the facts pleaded in the bill and admitted by the answer, the supposed conversion developing for the first time as a technical legal consequence of the holding of the Circuit Court of Appeals supports the judgment of the trial court, which was for the value of the shares so sold and transferred".

Neither is this a question arising incidentally in a case rightly begun in equity. Such a position cannot be consistently maintained by the petitioner in view of the fact that the bill in equity alleges the sale to George A. Barceloux and attacks its validity and prays for judgment that the sales be declared void.

On reargument in the Circuit Court of Appeals, the petitioner and respondent submitted typewritten briefs. The best answer to the claim of conversion now made by petitioner is the following argument which we take the liberty of quoting from page 16 of his typewritten brief:

> "It is this creditors' (not creditor's) suit which devolves as a right of action in the trustee under Bankruptcy Act, Section 70e. We believe that a reading of Bankruptcy Act, Section 70, as a whole, will show that under subdivision 'a' (Section 70a) the trustee's right of action may be either legal or equitable, in either case derived from and through the bankrupt, but under

Section 70e it must always be equitable and derived from the creditors. We say this because under California Civil Code, Sections 3439 and 3440, a transfer in fraud of creditors is void as against creditors and all others mentioned in the statute; but it may not be void between the debtor and the transferee, for if there is anything left after the creditors are satisfied the debtor or the transferee will have it. In a law court it would be wholly void or wholly valid, speaking of federal courts which preserve legal and equitable distinctions. This suit proceeds under Section 70e and not under Section 70a.

Therefore, it is not the same as those causes of action which belonged to the bankrupt on the day of adjudication and which, by Bankruptcy Act, Section 70a (6), are taken as part of the estate of the bankrupt. Section 70a (6) reads: 'rights of action upon contracts or from the unlawful taking or detention of, or injury to, his property,' that is the bankrupt's property. Now it is perfectly clear that the bankrupt as against defendant Peter Barceloux Company on the day of adjudication had no property in these shares capable of being converted. The law of California is that:

> 'Conversion is a tort, and to establish it there must be a tortious act.' *Steele v. Marsicano,* 102 Cal. 666, 669.
>
> 'One who obtains a thing without consent of its owner, or by a consent afterwards rescinded,' is under an obligation to restore it. *California Civil Code,* Section 1712.

It will be noticed that this statute does not contain the word 'conversion' but is contained in

that part of the Civil Code defining torts, and it is this tort which is commonly called conversion.

> Shares of stock with or without the certificate may be the subject of conversion. *Payne v. Elliott,* 54 Cal. 339.
>
> 'To enable a plaintiff to recover for property taken by a wrongdoer, he must have the general ownership or a special ownership in the goods, and one having the possession merely is the owner as against a wrongdoer.' *Rosenthal v. McMann,* 93 Cal. 505, 508.

Tested by these rules, the bill does not allege anything to show that the bankrupt on the day of adjudication could have maintained an action for conversion against Peter Barceloux Company for these shares. The allegations of his fraudulent consent show that he could not have done so. Therefore, plaintiff cannot sue as successor to the bankrupt's estate under Bankruptcy Act, Section 70a (6). More than that, when the trustee sues under Section 70e, he sues for all the creditors; and it is plain that the creditors, including Freeman, could not have sued for a conversion.

And so it must be true that plaintiff, suing in the creditors' right, is not suing for a conversion, since no creditor could sue in conversion. Suing for value of the property is quite a different matter. *This suit is for value, but not for damages for conversion.* The value sued for is the value of the equities of which the bankrupt's creditors were deprived by the fraudulent transfer, all the value for all the creditors, the surplus, if any, reverting to the bankrupt's transferee when all the creditors are satisfied. But

> that suit must always be in equity, whether property be recovered to be reduced to money or money be recovered directly.
>
> It is thus demonstrable that this suit and this bill will not sustain any construction as an action for conversion, a common law tort".

Therefore, all of these facts were presented in the pleadings of the petitioner, and the subject of conversion was presented to the Court. The statement in the petitioner's brief, that the supposed conversion developing for the first time as a technical legal consequence of the holding of the Circuit Court of Appeals is inaccurate.

Under the new equity rule, if this be an action for conversion, then a Court of Equity has no jurisdiction thereof, and the case was not rightly begun in equity because the petitioner was in the full possession of the facts, as is shown by his pleading.

In *Griffin v. Smith,* 177 Cal. 482, the Court says:

> "Since the pledge was created more than four months before the filing of the petition in bankruptcy its validity was in no way affected by the bankrupt proceedings, and the trustee would only have taken such interest in the stock as the debtor had and since the pledgee under the terms of the agreement had the right to sell and apply the proceeds to the payment of his debt, he, the pledgee, had a right which might have been exercised without resort to any court and such right not affect the bankrupt proceedings. (Hiscock v. Varick, 206 U. S. 28, 51 L. Ed. 945, 27 Sup. Ct. Rep. 681.)"

Assuming for the sake of the argument that the sale was invalid, the pledges of the respondent still exist, and were not destroyed by such invalid sale.

In *Williams v. Ash,* 111 Cal. 180 (185), the Supreme Court of California pointed out the distinction between an invalid or irregular sale to satisfy a lien, and one to satisfy a pledge. It was held that the pledge was not destroyed.

The case of *Lowe v. Ozmun,* 3 Cal. App. 387, cited by petitioner on page 55 of the brief, is not identical in facts with the case at bar. In that case after the irregular sale, Ozmun claimed the bonds adversely to plaintiff and that plaintiff had no right to redeem the sale. He acted in defiance of plaintiff's rights.

No question was raised as to the validity of this sale until the filing of this action. Respondent's rights are based on its pledge. If the sale was irregular or invalid, the pledge is not destroyed, nor could the respondent be guilty of conversion unless it asserted something in defiance of the plaintiff's rights.

The case of *Bell v. Bank of California,* 153 Cal. 234, does not deal with the question of conversion but only involves the statute of limitations.

In *Henning v. Akin,* 91 Cal. App. 246, plaintiff was seeking to recover the surplus remaining in the hands of the pledgee over and above the debt after an invalid sale of the pledged property.

In *Dibert v. Wernickle,* 214 Fed. 672, the pledgee purchased at his own sale and for the avowed purpose of acquiring ownership.

Feilback Co. v. Russell, 233 Fed. 412, involved the sale of property acquired under a preferential transfer made within four months of the adjudication of bankrupt.

THERE WAS AN IMMEDIATE DELIVERY AND A CONTINUED CHANGE OF POSSESSION AS REQUIRED BY SECTION 3440 OF THE CIVIL CODE OF THE STATE OF CALIFORNIA.

The respondent raised the question as to the existence of the antecedent pledge, in support of its point that, if such pledge existed, it was not attacked in this proceeding, was valid and the respondent was entitled to the certificates to secure that antecedent pledge, regardless of the validity of the pledges in question.

Counsel is in error in the statement that the question was raised at the trial for the purpose of defeating the legal effect of the lack of delivery under the written pledge agreement dated April 27th, 1926. The trial Court's holding that there was a lack of delivery under the pledges of April 27th, 1926, and June 29th, 1926, is shown by the following excerpt from the opinion:

> "In respect to the pledge of the 2494 shares to defendant corporation, it appears that if it was attempted to be made before Henry resigned as president, it was void for that the pledged certificate and any writing of pledge until said time were in his possession along with all other corporate documents and books" (R. 33).

The evidence as to the antecedent pledge was offered by petitioner when he called the two Barceloux as witnesses. If their testimony is to be rejected as suggested in the brief, then there is an absence of any evidence in the record raising any question on which to base a finding of lack of delivery at any time.

However, as shown by the quotation from the opinion of the Court, instead of disbelieving the testimony of these witnesses, the Court accepted it and then decided that as a question of law, there was no evidence of possession, because the shares in question were in the possession of Barceloux along with all the other corporate documents and books. It is undisputed that after his resignation on July 28th, 1926, the shares of stock were in the actual custody and control of the corporation.

How can petitioner argue that these shares were not in the possession of the respondent, in view of the conduct of Mr. Freeman and his acceptance of an assignment subject to the pledge?

Aside from the question of possession under the antecedent pledge, both the pleadings and the proof show an actual, immediate and continued change of possession after the date of the pledges in question. It is undisputed that if the pledgor had any possession of the shares of stock it was not in his individual capacity.

As the Court found, his only possession of these certificates was with the other corporate books and documents.

Furthermore, Certificate No. 5 contains a proper endorsement showing the pledge to the respondent.

Mr. Freeman testified at page 411 of the transcript of the record that the statement furnished him as of June 24th, 1926, contained a statement of this pledge.

In *Feeley v. Boyd,* 143 Cal. 282, it is stated that Section 3440 should receive a reasonable construction and that it did not require delivery *instanter.*

However, Mr. Barceloux testified that on the signing of the pledge agreement, the shares were returned to the safe deposit box of the company. Although he may have had access to the safe deposit box of the company, as president, still the deposit of these shares in that safe deposit box was a sufficient delivery.

Under the California authorities, the party making the delivery is not precluded from having some connection or control thereof if consistent with the original transaction.

Manor v. Dunfield, 33 Cal. App. 560.

Barceloux had possession of the shares as president of the corporation and he was acting under the direction and control of the corporation.

Section 3440 of *California Civil Code* only applies to a transfer "if made by a person having at the time the possession or control of the property." Barceloux individually, had neither possession nor control.

In *Hilliker v. Kuhn,* 71 Cal. 220, it is held that if the pledgor after delivering possession to the pledgee, either with or without his knowledge or consent, had

for a time taken charge of the property, this would not be in violation of Section 3440, of *California Civil Code.*

In *Sexton v. Kessler & Co.*, 172 Fed. 535, a banking house by agreement, and to provide security for drafts drawn by it in the course of business on its correspondent in England, placed certain stocks and bonds either transferable by delivery or endorsed in blank in an envelope in its safe deposit vault marked "Escrow, for account of" the Manchester House, and furnished that house with a list of securities giving their market value. These transactions were entered on the books of the New York House. This house subsequently failed and the trustee in bankruptcy brought an action in equity to set aside the transfer. The District Court held that there was a delivery of the securities. The transfer was attacked, on the ground that there was no delivery of possession to the Manchester House. It was conceded that a delivery was necessary to constitute a valid pledge.

The Circuit Court of Appeals held that intention to secure was plain; that what the parties did clearly evidenced their intention. There was a family relation between the two houses and they had been dealing with each other for a long time. It was held that the Manchester House was entitled to the possession of the securities.

On page 58 of petitioner's brief, an attempt is made to demonstrate the falsity of the testimony of George Barceloux by referring to Defendant's Exhibit No. 7, with the comment that the books do not show a debit

balance in favor of the corporation until June 28th, 1923.

This Exhibit 7 is a ledger sheet which starts with a balance, but petitioner overlooks the testimony of Mr. George A. Barceloux that this ledger sheet does not cover the whole period of the transactions involved, but was a new sheet. In testifying therefrom, the witness stated that it was started as of December 31st, 1922, and was apparently carried over from the other book and went down to the time the note of June 17th, 1925, was taken (R. 326).

Furthermore, the letter of Ware & Ware to Mr. Freeman mentions the fact that they had told him over the phone that before your assignment was ever made a proper entry on the books of the company was made showing the pledge of this stock (R. 407).

If the facts referred to on page 58 of petitioner's brief stamps the testimony of Barceloux as false, we repeat that the petitioner is without any evidence showing that there was no delivery and no previous pledge.

It must be borne in mind that much of the testimony of Mr. Barceloux was in relation to what the ledger sheet showed.

The promissory notes were introduced in evidence and in the absence of any testimony are presumed to have been executed on their dates and for a valuable consideration.

There is not a single entry in the ledger sheets inconsistent with the testimony of George and Henry Barceloux.

Assertion is made on page 58 of petitioner's brief that the documentary proof shows that the indebtedness of Barceloux was paid off prior to 1923, thereby terminating the antecedent pledge. There is no evidence to support this statement and it is entirely contradicted by the testimony of Freeman and his conduct with reference to these pledges.

THERE IS NO SUBSTANTIAL CONFLICT IN THE EVIDENCE AND ALL OF THE WRITTEN EVIDENCE IS INCONSISTENT WITH THE CLAIM OF FRAUD.

On page 62 of the petitioner's brief it is urged that the findings of fact should not be reversed on appeal when based on the testimony of witnesses heard and observed by the trial Court, and also on written evidence, consistent with his findings and inconsistent with contrary findings.

As we have already stated, the case was submitted to the trial Judge on the testimony of George and Henry Barceloux and Mr. Freeman and writings. The Trial Court did not disregard the testimony of George and Henry Barceloux, but based its decision upon inferences drawn from that testimony. This is conceded by petitioner in a statement on page 67 of the brief that "there is no conflict in the facts or sequence of the various transactions between the bankrupt and respondent company, but the only conflict, if any, is in inferences that may be deduced from these facts."

Petitioner does not specify a single writing inconsistent with the fairness of the transactions involved.

Generally stated, the writings introduced in evidence consisted of the book accounts of both the respondent and Henry Joseph Barceloux; Certificate No. 5 properly endorsed and cancelled; Certificate No. 12 issued after the pledge agreement in lieu of Certificate No. 5; the written pledges; the minutes and records of the corporation, and the correspondence between Mr. Freeman and Mr. Ware.

All of this written evidence is inconsistent with the idea of fraud.

There is no uncertainty in the opinion of the Circuit Court of Appeals. It heard this case *de novo* and its finding that there was a valid pledge and no fraud is not to be disregarded.

Having held that there was no fraud, as petitioner admits on page 63 of his brief, the other questions are eliminated from the case.

As stated, the law of California authorizes preferences. Mere insolvency does not defeat the preference. It is immaterial if the creditor knows that the debtor is insolvent or in failing condition, except that knowledge of insolvency may be mere evidence of an attempt to create and receive a fraudulent preference.

It cannot be denied that there was a valuable consideration for all of these transactions. The only question raised was the statement of Mr. Freeman that he understood the indebtedness to be $24,000.00. Furthermore, there is no evidence showing a lack of consideration and the writings raise the presumption of a consideration.

As stated in 12 *California Jurisprudence,* 1012, cited by petitioner, it is necessary to show that the creditor was helping the debtor cover up his property to keep others from seizing it, to establish the petitioner's case.

Freeman could have levied an execution on this property at any time, either before or after the pledge agreements, and sold the equity of Barceloux.

There is no evidence justifying a finding that the respondent was endeavoring to assist Barceloux in covering up his property. If such had been the intention, the securities would have been transferred to the respondent in satisfaction of its demands, instead of being pledged.

Cases are cited on page 64 of petitioner's brief that a creditor receiving a preference must take only enough to satisfy his debt. These cases apply to a transfer and not to a pledge.

The two pledges involved in this action amount to nothing more than the execution of written pledge agreements to evidence a pledge previously made by deposit of the securities.

How can it be said that the pledge of June 29th, 1926, was intended to cover up the properties of the bankrupt, when it was made after both Mr. Freeman and the respondent had been satisfied, and particularly in view of the fact that after investigation Mr. Freeman declined to accept these stocks as security for his judgment.

It is manifest that there would have been no bankruptcy had not Mr. Freeman issued execution on his judgment in November, 1926.

Much is said in the brief of petitioner as to the sequence of events.

As heretofore stated, there was no sequence of events so far as the respondent is concerned. The respondent was not connected with any transactions subsequent to the execution of the pledge of June 29th, 1926, except the sale. Furthermore, the transactions of Henry Joseph Barceloux after the pledges consisted of efforts to conserve his properties and to take care of obligations in favor of other persons as he had taken care of Mr. Freeman.

The statement that all of the bankrupt's property of the value of $180,000.00 was, at the date of his adjudication as a bankrupt, transferred to and held by the respondent and members of Henry's family, is incorrect.

The only property that the respondent received is the stock in question. If Barceloux possessed property of this value, is it not singular, as well as most significant that, in September, 1926, when Freeman learned of the pledge sale, he made no effort to execute on his judgment.

The subsequent transactions between Henry Joseph Barceloux and the members of his family have been analyzed. All of them were based on a valid consideration. None of them realized anything from such transactions. Moreover, Mr. Freeman, the principal

and only active creditor of Mr. Barceloux, had been offered his choice, these, as well as other properties, as security for his judgment.

Consequently, it cannot be argued that there was any intent, fraudulent or otherwise, to hinder, delay or defraud any creditor.

On page 71 of the petitioner's brief, it is stated that the bankrupt conveyed his only unincumbered substantial asset to the Barceloux family. This is predicated on the assumption that no antecedent pledge existed.

As we have said, the antecedent pledge is established by the testimony of the Barcelouxs, as well as the written endorsement on Certificate No. 5, and the possession of this certificate by the respondent.

If we are to ignore the testimony of the Barcelouxs, then the certificate with this written endorsement, necessitates a finding that the antecedent pledge existed, because such is the presumption in the absence of evidence to the contrary.

On page 72 of petitioner's brief, the pledges are attacked on the ground that the respondent accepted excessive security. While the acceptance of excessive security is to be considered in connection with other facts, still standing by itself, it is not sufficient to sustain petitioner's case.

Mr. Freeman testified that he took the stock because the statement furnished him by Barceloux valued it at $80,000.00, and that he was familiar with the Peter Barceloux Company assets and that he was in-

formed by Barceloux that he owed the company $24,000.00. His statement that he did not know of any other indebtedness is contradicted by the paper he submitted to the corporation leaving the amount blank because there was other indebtedness to be included. He took the Lake County Ranch, as he says, in addition to the assignment of the stock of the respondent, at the same time "because I wanted ample security for this obligation" (R. 416).

Another significant statement of Mr. Freeman is that at the time of the trial he did not know for what obligation the stock was eventually sold. Why his indifference or lack of interest in the sale in not having enquired into the obligations for which it was sold from September, 1926, after he learned of the sale, and before the date of the trial on March 11th, 1929.

THE SECURITIES WERE NOT SOLD FOR ANY INDEBTEDNESS NOT SECURED BY THE PLEDGE.

The only item seriously challenged by petitioner's evidence as not being secured by the pledge is that of $1,800.00 plus $830.00 interest.

The Circuit Court of Appeals held that this item was not due the company and should not have been charged against the proceeds of the sale, for it was an indebtedness due the father, Peter Barceloux, and was not transferred to the company. It was also held that this claim was made in good faith.

We respectfully suggest that neither Henry Joseph Barceloux, nor the trustee is in a position to deny that this item belonged to the company.

By reference to page 53 of the transcript of the record, the Court will find that this Cartenberg land agreement was valued at $4500.00 by the Master as of August 16th, 1926. Henry Joseph Barceloux testified that the interest of Peter Barceloux in the Cartenberg contract was not assigned to the Peter Barceloux Company by a separate written instrument, but might have been assigned by a blaak assignment with a lot of other property (R. 377).

On page 319 of the record, George A. Barceloux testifies that the interest of Peter Barceloux in this contract was transferred by instrument delivered by the father to the corporation in 1912. That the father was operating the corporation then, and continued in its management until 1918 (R. 319).

The $1800.00 item grows out of the purchase of a tract of land by Charles L. Donohoe, Henry Barceloux and Peter Barceloux, the title of which was vested in the name of Henry Barceloux. Henry sold the property from time to time from and after the organization of the company, and during the time Peter Barceloux was handling its affairs, his share of the Cartenberg contract was collected by him and turned over to the company as its property (R. 317, 318).

This constituted an equitable assignment, because it clearly appears from the entire transaction that it was the intention of the parties to pass the title to this

money to the company. No formal assignment was necessary.

Puterbaugh v. McCray, 25 Cal. App. 470.

Certainly Peter Barceloux, under this state of facts, could not successfully maintain that the respondent was not entitled to receive his share of the money due on this deal.

Henry did not pay all of this share to the company, but was charged with it on the books of the company. All of the parties recognized it as the property of the company. Henry Joseph Barceloux could not contend that the company was not entitled to receive and claim this money.

The testimony shows that Henry agreed with the company that he owed this money and was willing to pay interest thereon (R. 319).

However, if it be assumed that the item was not legally due the respondent, then the sale was merely irregular, and did not deprive the respondent of its lien for the other items which are admittedly due it. This irregularity would not entitle the petitioner to judgment that the whole transaction was fraudulent, but his only relief would be that the sale was irregular, leaving to the respondent its rights under the law to resell the property.

On page 74 of petitioner's brief, the sale is attacked because interest was charged on an open account. No such attack is made in the bill. This item represents $1717.62 cash advanced. It is not an open account as suggested by petitioner.

The item being for moneys loaned, it is presumed to be made upon interest unless it is otherwise expressly stipulated at the time of the writing.

Civil Code of California, Section 1914.

THE PLEDGE SALE WAS REGULARLY AND FAIRLY CONDUCTED.

We submit that there is no evidence in the record sustaining the proposition that at the sale there was no outcry, no bids invited, or that the sale was conducted in any other than in the usual manner of making such sale. There was no offer to prove that others were prepared to purchase and might have done so but for want of information, or that any one was prepared to redeem the pledge or that any one had offered to redeem it.

There was nothing in the evidence tending to show a wanton sacrifice or an intent to buy in at an inadequate price so as to justify the inference of fraudulent purpose.

As this Court held in *Hiscock v. Varick Bank,* 206 U. S. 28, a sale of collateral security at public auction without notice where the pledge so provides, and the purchase thereof by the pledgees are not void as against the trustee in bankruptcy of the pledgor in the absence of fraud, and that such sale is valid. Also that the burden of proof that a sale by the pledgee of the property of the bankrupt made conformable to the contract of pledge was unfair is on the trustee in

bankruptcy of the pledgor who seeks to avoid the sale.

The only evidence introduced in support of these allegations of the bill is the testimony of George A. Barceloux and Mrs. Gelinas and the minutes of the corporation.

Resolutions were regularly adopted, notice was given as required by law, a notice of sale was posted on a telegraph pole in front of the office of Mr. Freeman, the sale had on the Court House steps, the notice was read, bids were invited, the call was made three times, no bidders appeared (R. 316). Mrs. Gelinas testified that they stayed quite a while after reading the notice, perhaps an hour (R. 384).

The law does not require a corporation to forbear the enforcement of a valid lien until such time as the property might be valuable enough to satisfy all demands.

There is nothing to distinguish this sale from similar sales under existing pledge or foreclosure. It is undisputed that the notice of the sale was legal.

No inference of fraud can be deduced from the failure of the respondent to give notice to Freeman.

The indifference of Freeman, after learning in September, 1926, that the property had been sold, and his failure to take any action whatever to attack that sale justifies the inference that he knew of the sale and he had recognized it as a valid proceeding.

On page 415 of the record Freeman testifies that after giving notice of his assignment he did nothing

"and as to whether being present at the sale of this stock I would have paid the amount of their claim against it is a matter that would have had to be determined at that time and what I would have done I think that is entirely immaterial and a conclusion on my part."

On page 76 of petitioner's brief, it is argued that because one member of a family takes security from another member of the family, as stated therein, necessarily an inference must be deduced that there is some agreement between them that all of the property or a portion thereof will be returned to the debtor when his financial troubles are over and after he has been discharged as bankrupt.

Such a suggestion may be dismissed with the statement that it is not supported by anything in either the pleadings or the proof. It is also completely disproven by the act of respondent in selling the stock. A finding that a secret trust existed must be based upon something besides the imagination of counsel.

PART TWO.

OTHER GROUNDS DISCLOSED BY THE RECORD RELIED UPON BY RESPONDENT AS GROUNDS FOR REVERSAL NOT DECIDED BY THE CIRCUIT COURT OF APPEALS.

If all of the above questions are determined adversely to respondent, there still remains numerous grounds on which respondent is entitled to a reversal of the decree and which were not decided by the Circuit Court of Appeals.

Respondent does not rely entirely upon the points decided by the Circuit Court of Appeals.

The record discloses other grounds not considered by that Court for reversing the judgment and ordering a new trial.

Under these circumstances, it is open to this Court to deal only with the matter considered by the Circuit Court of Appeals and to remand the case to it for any needed action upon other questions, or to proceed to a complete decision.

Cole v. Ralph, 252 U. S. 286.

In view of this rule, we will now call attention to the points urged as grounds of reversal and not decided by the Circuit Court of Appeals:

A. The Court had no jurisdiction to enter a judgment for the full value of the property pledged, because petitioner is only entitled to the value of the property as of August 16th, less the amount due on the Freeman judgment.

Paragraph IV of the bill alleges the value of the 2499 shares of the capital stock of the respondent pledged April 27th, 1926, to be the sum of $80,000.00 (R. 5). That the value of the shares of stock pledged on June 29th, 1926, is the sum of $2100.00 (R. 6).

Paragraph X of the bill (R. 11) alleges the Freeman assignment and that an accounting is necessary to ascertain what, if any, moneys were at the time of the sale due to the respondent, and to ascertain what moneys, if any, were due to Freeman upon the security of his assignment at the time of the sale, and at the time of the filing of the action. Also, that complainant is entitled to recover from defendant, Peter

Barceloux Company, the excess, if any, over and above the amount, if any, found to be due and owing to said George R. Freeman upon the security of said transfer and assignment at the time of said sale and still due and owing, and the value of all of said shares of stock at the time of said sale (R. 12).

The prayer specifically asks for "judgment against the defendant, Peter Barceloux Company, for the value of all of said shares of stock at the time of said sale, to-wit, August 16th, 1926, less such sum, if any, as may be found to be due or owing to George R. Freeman, as administrator, etc."

Indisputably, the right asserted by petitioner in his bill, is to the value of the stock less the Freeman demand.

The judgment awards him not only the full value of the stock regardless of the amount due Freeman, but the highest value between the date of the pledges and the date of the audit.

Notwithstanding the assignment of this stock and the execution of the deed of trust was made to Freeman at the same time and under similar conditions as the pledges to the respondent, the trustee does not question the Freeman transaction, but recognizes it as valid, and only seeks the value in excess of the Freeman demand as stated.

The measure of his rights is fixed by the allegations and the prayer of the bill.

The judgment for the highest market value evidently originated in the mind of the trial judge, be-

cause such relief did not appear in the case until the filing of the opinion.

The petitioner's recovery is in excess of the rights claimed by him in his bill.

This judgment is clearly erroneous. This point has been decided by the Supreme Court of California in the case of *Meisner v. McIntosh*, 205 Cal. 11:

> "In this we think appellants are right. The authorities overwhelmingly support appellants' contention. 'The rule is firmly established that irrespective of what may be proved, a court cannot decree to any plaintiff more than he claims in his bill or other pleadings' (15 R. C. L. 604). 'A judgment cannot be properly rendered for a greater sum, whether by way of debt or damages, than is claimed or demanded by plaintiff in his declaration or complaint' (33 'Cor. Jur. 1164). 'The judgment is for $7470 and costs. The plaintiff prayed for the sum of six thousand dollars, the value of the property, and five hundred dollars damages, and the prayer followed the ad damnum clause of the complaint, which alleges that plaintiff has been damaged in the sum of five hundred dollars by reason of the detention. In the absence of an amendment to the complaint, therefore, the court could not allow any damages beyond the amount prayed for' (Burke v. Koch, 75 Cal. 356, 360 (17 Pac. 228, 229).) The judgment was accordingly modified by striking out the amount thereof and inserting the sum of $6500. The judgment was not by default, but was rendered after a trial of the action upon its merits. 'The finding of damage is for an amount greater than the complaint avers. Still, the find-

ing necessarily establishes that plaintiff was damaged to the amount he claims. The judgment may, therefore, be modified, and it will still be supported by the finding in question.' Kerry v. Pacific Marine Co., 121 Cal. 564, 573 (66 Am. St. Rep. 65, 54 Pac. 89, 92)."

Therefore, the judgment here in excess of the amount of damages claimed or demanded by petitioner cannot stand.

B. The Court had no jurisdiction to enter judgment in excess of the value alleged in the complaint, and particularly for the highest market value between the date of the pledges and the audit.

As we have shown, the pleading distinctly alleges the value of the property (R. 546). The prayer is for the recovery of the value as of August 16th, 1926.

Under the authority of *Meisner v. McIntosh*, supra, a judgment in excess of the amount prayed for in the complaint is erroneous even if we assume that petitioner is entitled to the full value of the stock instead of the value thereof less the amount due Freeman.

In the dissenting opinion it is suggested that the allegation of value in the bill is a mere approximation, the accuracy of which is sought to be tested both in the allegations and in the prayer of the bill (R. 473).

As stated, the bill specifically alleges the value of the stock.

The statement that plaintiff has no means of ascertaining the actual value of such shares other than by

inquiry as to the value of the assets and liabilities does not make this statement a mere estimate. On the contrary, the allegation of the necessity of an inquiry is for the purpose of establishing the valuations alleged in the bill.

Aside from the allegations of the bill on the subject of value, the recovery of petitioner is measured by the prayer.

If this is to be treated as an action of accounting, then the following rule announced in *Horan v. Consolidated Mining etc. Co.*, 41 Cal. App. 337, applies:

> "The allegation as to the damage which the plaintiffs therein assert that they have sustained by reason of the retention of the property mentioned involves merely the statement of the value of the property, which is not only a proper but a necessary fact to be stated in an action for an accounting to meet the possible contingency that the party charged with having possession of the assets of which the accounting is asked has disposed of or in some way divested himself of such possession and is, therefore, in no position to account for the property in kind. The horses, wagon, and harness constituted a part of the account between the parties as to which an accounting is sought, and, this being a suit in equity for an accounting, it was, as above indicated, proper herein to allow damages as an essential element of the accounting, if it was made to appear that the property itself could not be accounted for. (1 Cyc. p. 408, and cases cited in footnote.)"

We quote the following from 12 *Ruling Case Law*, 641:

> "A fraudulent grantee cannot be required to account to the creditors of his vendor for any greater sum than the value of the property acquired by him under the transfer, and he may relieve himself from liability to the creditors of his grantor by paying to bona fide creditors a sum of money equal to the value of such property, or he may claim credit pro tanto for a smaller sum so paid, and it is immaterial that he was compelled to make such payment by legal process; but in such case the burden is on the fraudulent grantee not only to show the payment, but also to show that the debts discharged were subsisting, legal, bona fide demands against his grantor. The whole object of the law is to make the grantee disgorge the ill-gotten gain by virtue of the fraudulent transaction. When he does this, either by returning the property or its equivalent in money, he cannot be punished by making him pay more."

This is not an action for conversion and the rule declared in Section 3336 of the *Civil Code of California* is not applicable. It is a special rule of damages applicable to actions of conversion. The conversion referred to in that section is for the wrongful appropriation of goods, chattels or personal property.

Lynch v. McGhan, 7 Cal. App. 132, holds that Section 3336 is a special measure of damages for the conversion of personal property and does not apply to other cases where damages are sought.

If this is to be treated as an action for damages for fraud, it is covered by Section 3333 of the *Civil Code of California,* providing that for the breach of

an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by the code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

Armstrong v. Lassen Lumber & Box Co., 204 Cal. 533.

In this equitable action for accounting, this rule is not applicable for the reasons mentioned, and because it is an arbitrary rule prescribed by statute.

Section 3336 has been amended several times.

It is held in *Tulley v. Tranor,* 53 Cal. 274, that the rule of damages declared in Section 3336 as it existed at the time of the filing of this action was arbitrary.

Even in an action of conversion, the rule prescribed by Section 3336 cannot be applied unless there was a finding of due diligence in the prosecution of the action, and that "a whole year having elapsed between the commencement of the action and the trial, it cannot be concluded as a matter of law, that it was prosecuted with due diligence."

This stock was transferred in April and June, 1926, the trustee was appointed in March, 1927, and the action filed in March, 1928. Consequently, the delay in prosecuting the action after the appointment of the trustee precludes the application of this rule of damages.

C. Assuming that petitioner was entitled to recover the highest market value, still the value fixed by the Master and by the judgment is not the highest market value under the law.

This point was presented by the opening brief filed by respondent in the Circuit Court of Appeals on pages 102 et seq.

The Master did not ascertain the highest value of the shares included in the pledge, based on their situation at the time of the transfer. On the contrary, the Master took the various assets of the corporation and ascertained the highest value of each asset on different dates. Stocks thereafter acquired in exchange for some of those owned on August 16th, 1926, were valued in a similar manner.

In the case of *Lightner Mining Co. v. Lane,* 161 Cal. 704, the phrase "highest market value" was defined as follows:

> "The subsequent highest market value referred to in the second clause of section 3336, ordinarily means the subsequent value of the thing *in the condition it was in at the time of the conversion.* It would not include a value added to it by reason of an improved condition given to it by the defendant after conversion. Of course, if the property taken can be identified in its changed condition, the rightful owner may retake it as it is, since the title remains in him, and he may thus in that case obtain the benefit of the improved condition."

Instead of valuing the stocks in the condition in which they were at the time of the transfer, the decree awards the highest value of the stocks owned, as well

as stocks received in exchange for some of the stocks owned at the time, between the date of the transfer and the date of the audit.

To avoid unnecessarily extending the length of this brief, we are taking the liberty of referring to the argument contained in the brief filed in the Circuit Court of Appeals.

The Master was called on to determine the value of the shares of the Peter Barceloux Company according to the decree. The Master did not fix the aggregate value of the stock owned by the corporation on any particular date, but took the highest value of the different stocks on different dates. The Master should have selected some date and fixed the value of the Peter Barceloux Company stock by taking the highest value of all of its assets on that date. To attempt to value it by taking the highest value of different assets on different dates would not be a determination of the value of the Peter Barceloux Company stock on any given date.

It is not pretended that the value fixed by the Master is the value on August 16th, 1926. The Master fixed the value of the Peter Barceloux Company stock on September 26th, 1929, by taking a period of three years or more, and finding the highest value of each of its assets on any day during that period.

The Master's report shows that he determined the value of the Peter Barceloux Company stock by taking up the valuations of its different assets on different dates and placing a value on the stock equivalent

to the result shown by such figures. From this, he deducted the liabilities of the company.

D. That the valuation of the stock of the Peter Barceloux Company has not been fixed as required by law, because essential factors affecting the fixing of the value of the stock were disregarded by the Master.

We do not dispute the right of the Master to consider the value of the assets of the corporation, but we do dispute the legal right of the Master to place a value on the physical assets, and valuing the stock of the corporation accordingly, without taking into consideration other important facts recognized and declared by law as affecting the value.

This question is also presented at pages 109 et seq., of the brief filed by respondent in support of its appeal.

The case of *Henry v. Phillips,* 165 Cal. 134, is cited as sustaining the rule that such a valuation depends upon many facts and circumstances, such as the value of the property and assets owned, the dividends paid, the character and permanency of the business, the control of the stock, the management, and other facts.

We have also cited the case of *Western Union Tel. Co. v. Poe,* 61 Fed. 449, wherein the late Chief Justice Taft discussed the elements constituting the value of a corporation and its capital stock. The case arose under an Act of Ohio requiring the Assessor in determining value of property for assessments to "be guided by the value of such property as determined by the value of the entire capital stock of said companies." In this opinion it is stated:

> "It seems clear to me that the market value of its capital stock has no necessary or proper relation to the value of the tangible property of the company."

The opinion calls attention to the many factors to be considered in fixing the value.

In fixing the value of this stock the Master disregarded the following factors:

1. It is a family corporation;

2. Reservation of Lumina Barceloux of the earnings during her lifetime;

3. Corporation operating at a loss for three years;

4. Only one dividend declared during corporate existence;

5. Stock represents a minority holding;

6. Lands are principal assets of the corporation and are producing no revenue; and

7. General condition of the company.

E. The petitioner is not entitled to recover, even if the pledges attacked are fraudulent and void, because of the antecedent pledge shown by the undisputed testimony of the witnesses called by petitioner, the endorsement on certificate No. 5 and the possession of that certificate by the respondent.

Granting for the sake of the argument that the pledges attacked in the bill are void, still the petitioner would not be entitled to recover the property pledged, or its value, but would only be entitled to any surplus remaining after the sale of the collateral to satisfy the antecedent pledge.

We repeat that the existence of this antecedent pledge cannot be disputed, not only because of the

evidence, but also of the allegations contained in the bill that the securities were sold not only for the payment and satisfaction of the purported obligations and indebtedness set forth in the pledge agreements, "but also the following additional purported indebtedness or obligations."

Paragraph VIII of the bill (R. 9) alleges that the pledge of June 29th, 1926, was given when the corporation "already possessed property of said Henry Joseph Barceloux as security for such indebtedness of a value of over twice the total amount of such indebtedness."

If the testimony of the Barcelouxs is to be rejected, then the antecedent pledge is sustained by the admission of the pleadings, book entries, the endorsement of the certificate and its possession by the respondent.

F. Freeman was a necessary party to the action.

This point was not presented in the printed briefs filed in the Circuit Court of Appeals, because it was suggested by that Court on reargument and by permission of the Court typewritten briefs were filed.

We have already directed attention to the fact that in the bill the validity of the Freeman assignment is recognized and that the petitioner is only entitled to recover the value in excess of the Freeman demand.

The bill alleges that an accounting is necessary to ascertain the amount due the respondent and Freeman.

Assuming that the transaction was fraudulent, the trial Court could not properly do justice and equity

to all of the parties involved, after Freeman was dismissed as a party defendant.

It is stated that this dismissal was without the objection of the respondent. The respondent had no right to object. No affirmative relief was sought against Freeman by the respondent and the matter of dismissal rested wholly in the control of the petitioner.

Freeman had a direct interest in the property by reason of his assignment. If the pledges are void, then Freeman, and not the petitioner, is entitled to the possession of the stock pledged, and to sell the same in the manner provided by law to satisfy his demand, paying any surplus to the trustee.

This is recognized by the prayer of the bill which only asks that petitioner be given the value, less the Freeman demand (R. 13).

In any event, according to the theory of the bill, and on the assumption that the pledges are void, the title to the 2499 shares is in Freeman.

The Court could not determine the damages claimed by the petitioner in the absence of Freeman without prejudice to the rights of all the parties involved.

Section 389 of the *Code of Civil Procedure* of the State of California provides that the Court may determine any controversy before it, when it can be done without prejudice to the rights of others or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the Court *must* order them

brought in, and to that end may order amended and supplemental pleadings.

This section is mandatory.

In *O'Connor v. Irvine,* 77 Cal. 435, reference is made to the familiar rule that a Court of Equity will not permit litigation by piecemeal, and that it is the duty of the Court on its own motion to order the necessary parties brought in, although the defendants in the action have omitted to raise an objection of defect of parties by demurrer or answer. The Court finally states:

> "The failure of the Court so to do is fatal to the judgment."

In *McCabe v. Healy,* 138 Cal. 89, it is stated that where an individual has an interest or right in the subject matter of the litigation, which is liable to be destroyed or diminished by the plaintiff's success in the litigation, he has an interest which makes him a necessary party.

That this duty is mandatory on the Court is also announced in the following California cases:

Solomon v. Redona, 52 Cal. App. 306;
Ambassador Petroleum Co. v. Superior Court, 208 Cal. 671.

To the same effect is *Bland v. Fleeman,* 29 Fed. 669.

As decided by this Court in *Niles-Bement Pond Co. v. Iron Moulders Union,* 254 U. S. 77, 65 L. Ed. 147, there is no prescribed formula for determining

whether a person or a corporation are necessary parties to the action.

In *Young v. New Pedrara Onyx Co.,* 48 Cal. App. 1 (28), it was held that in a controversy as to the capital stock of a corporation that a third person who held stock under pledge was a necessary party to the action.

CONCLUSION.

The respondent is entitled to prevail in this action. If not entitled to prevail, the judgment rendered by the trial Court is inequitable in that instead of restoring the property to the respondent, it awards more than the value thereof at the time of the pledges.

Therefore, if the judgment be affirmed, petitioner not only recovers the full value of the stock, but a profit based on a temporary increase in its value, which was never realized by the respondent, and might not have been realized by Henry Joseph Barceloux had it not been pledged.

As stated by the Supreme Court of the State of California in *Tulley v. Tranor,* 53 Cal. 274, in dealing with the subject of conversion:

> "It cannot be said in a given case that the party injured would have retained his property until the date of the trial of the action had it not been converted, or that he would have sold at the highest price or the lowest price. It is better than to fix a rule of damages—one in itself simple,

and which on the whole shall approximate the actual damages."

Dated, March 3, 1933.

Respectfully submitted,

STEPHEN W. DOWNEY,
Solicitor for Respondent.

HUSTON, HUSTON & HUSTON,
W. T. BELIEU,
PERCY NAPTON,
Of Counsel.

(Appendix Follows.)

Appendix

Code of Civil Procedure of the State of California:

SECTION 389. Court, When to Decide Controversy or to Order Other Parties to be Brought in. The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings or a cross-complaint to be filed, and summons thereon to be issued and served. And when, in an action for the recovery of real or personal property, or to determine conflicting claims thereto, a person, not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in, by the proper amendment. [Amendment approved 1907; Stats. 1907, p. 704.]

SECTION 2055. Examination of Adverse Party. A party to the record of any civil action or proceeding or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent or managing agent of any corporation which is a party to the record, may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses. The party calling such adverse witness shall not be bound by his testimony, and the testimony given by such witness may

be rebutted by the party calling him for such examination by other evidence. Such witness, when so called, may be examined by his own counsel, but only as to the matters testified to on such examination.

Civil Code of the State of California:

SECTION 1712. Restoration of thing wrongfully acquired. One who obtains a thing without the consent of its owner, or by a consent afterwards rescinded, or by an unlawful exaction which the owner could not at the time prudently refuse, must restore it to the person from whom it was thus obtained, unless he has acquired a title thereto superior to that of such other person, or unless the transaction was corrupt and unlawful on both sides.

SECTION 1914. Loan presumed to be on interest. Whenever a loan of money is made, it is presumed to be made upon interest, unless it is otherwise expressly stipulated at the time in writing. [Amendment approved 1874; Code Amdts. 1873-74, p. 244.]

SECTION 3333. Breach of obligation other than contract. For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

SECTION 3336. Damages for conversion of personal property. The detriment caused by the wrongful conversion of personal property is presumed to be:

First—The value of the property at the time of the conversion, with the interest from that time, or,

an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted; and

Second—A fair compensation for the time and money properly expended in pursuit of the property. [Amendment approved June 5, 1931; Stats. 1931, p. 1358.]

SECTION 3432. Payments in preference. A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another.

SECTION 3439. Transfers, etc., with intent to defraud creditors. Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor.

SECTION 3440. Transfers presumed fraudulent. Transfers of wines. Bulk sales. Public auctions. Transfers under orders of court. Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and

followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer;

Transfers of wines. Provided, however, that the provisions of this section shall not apply to the transfers of wines in the wineries or wine cellars of the makers or owners thereof, or other persons having possession, care, and control of the same, and the pipes, casks, and tanks in which the said wines are contained, which transfers shall be made in writing, and certified and verified in the same form as provided for chattel mortgages, and which shall be recorded in the book of miscellaneous records in the office of the county recorder of the county in which the same are situated;

Bulk sales. Provided, also, that the sale, transfer, or assignment of a stock in trade, in bulk, or a substantial part thereof otherwise than in the ordinary course of trade and in the regular and usual practice and method of business of the vendor, transferor, or assignor, and the sale, transfer, assignment or mortgage of the fixtures or store equipment of a baker, cafe or restaurant owner, garage owner, machinist, or retail or wholesale merchant, will be conclusively presumed to be fraudulent and void as against the existing creditors of the vendor, transferor, assignor

or mortgagor, unless at least seven days before the consummation of such sale, transfer, assignment or mortgage, the vendor, transferor, assignor or mortgagor or the intended vendee, transferee, assignee or mortgagee, shall record in the office of the county recorder in the county or counties in which the said stock in trade, fixtures or equipment are situated a notice of said intended sale, transfer, assignment or mortgage, stating the name and address of the intended vendor, transferor, assignor or mortgagor, and the name and address of the intended vendee, transferee, assignee or mortgagee, and a general statement of the character of the merchandise or property intended to be sold, assigned, transferred or mortgaged, and the date when and the place where the purchase price or consideration, if any there be, is to be paid;

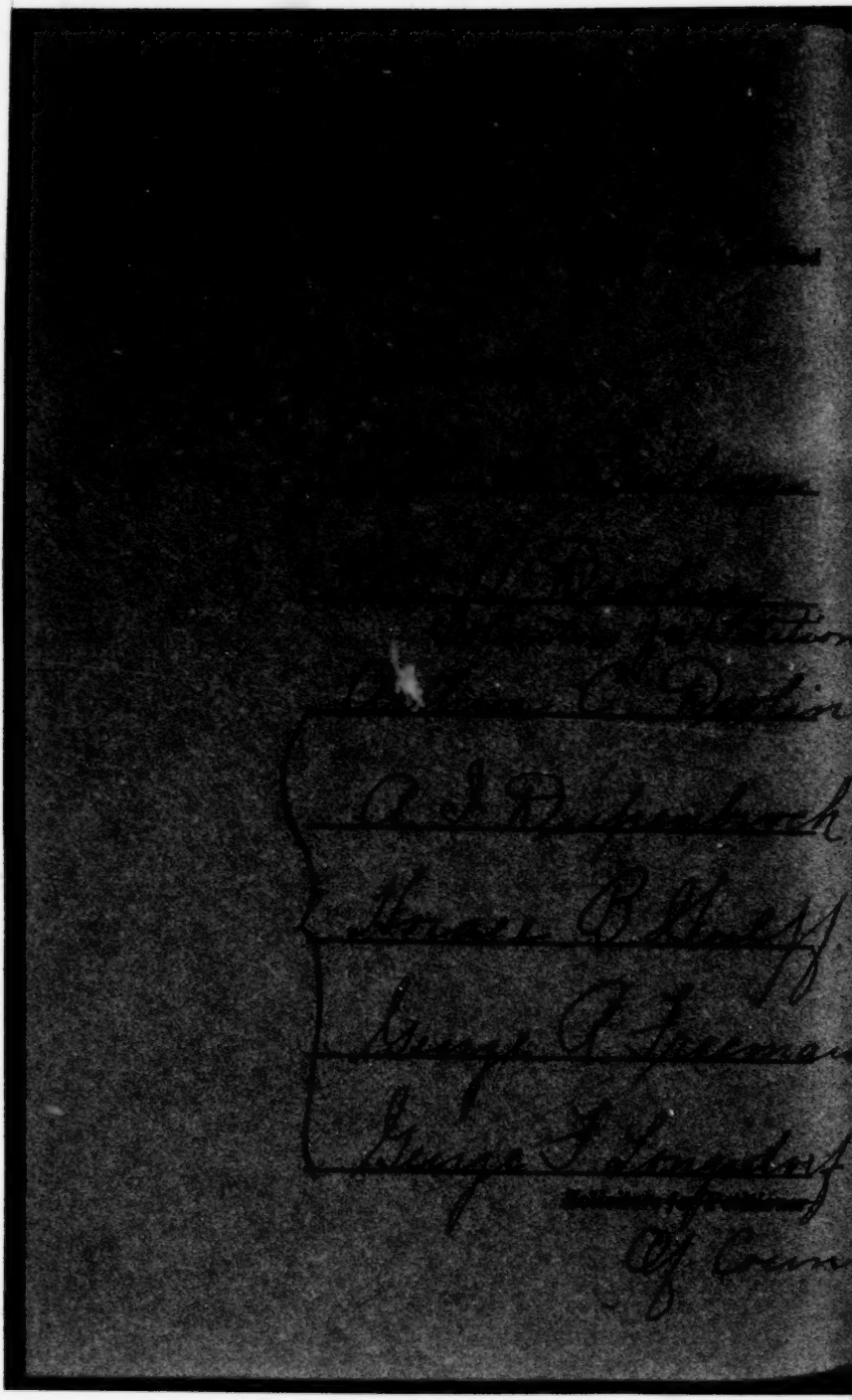
Public auctions. Provided, nevertheless, that if such intended sale is to be at public auction the notice above required to be recorded shall state that fact, the time, terms, and place of said sale, the names and addresses of the vendor and auctioneer, and a general statement of the character of the merchandise or property intended to be sold; but such sale shall in no event occur within seven days of the date of recordation of said notice; and any auctioneer selling said stock in trade or fixtures and store equipment of a baker, cafe or restaurant owner, garage owner, machinist, or retail or wholesale merchant shall be personally liable for all damages incurred by any creditor of said merchant in the event said notice is not recorded as aforesaid;

Transfers under order of court. Provided, further, that the provisions of this section shall not apply or

extend to any sale, transfer, assignment or mortgage of the fixtures or store equipment of a baker, cafe or restaurant owner, garage owner, machinist, or retail or wholesale merchant made under the direction or order of a court of competent jurisdiction or by any executor, administrator, guardian, receiver, or other officer or person acting in the regular and proper discharge of official duty, or in the discharge of any trust imposed upon him by law, nor to any transfer or assignment, statutory or otherwise, nor to any mortgage or chattel mortgage made for the benefit of creditors generally, nor to any sale, transfer, assignment or mortgage of any property exempt from execution. [Amendment approved May 23, 1925; Stats. 1925, p. 725.]

Section 70e Bankruptcy Act.

e. The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.



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CHARLES ELMORE

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1932

No. 564

F. E. BUFFUM, as Trustee in Bankruptcy of Henry Joseph Barceloux, Bankrupt,
Petitioner,

vs.

PETER BARCELOUX COMPANY (a corporation),
Respondent.

PETITION OF RESPONDENT FOR A REHEARING.

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PERCY NAPTON,
Woodland, California,
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At no time in this proceeding has Freeman as administrator, or petitioner, taken the position that Freeman, as such administrator has either disregarded, waived, disaffirmed or abandoned his security consisting of the assignment of the stock involved in this action, subject to the pledge of the respondent 2

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In the Supreme Court
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Petitioner,

vs.

PETER BARCELOUX COMPANY (a corporation),
Respondent.

PETITION OF RESPONDENT FOR A REHEARING.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Now comes the respondent in the above entitled action, and respectfully petitions for a rehearing of this case on the following points:

I.

AT NO TIME IN THIS PROCEEDING HAS FREEMAN AS ADMINTRATOR, OR PETITIONER, TAKEN THE POSITION THAT FREEMAN, AS SUCH ADMINISTRATOR HAS EITHER DISREGARDED, WAIVED, DISAFFIRMED OR ABANDONED HIS SECURITY CONSISTING OF THE ASSIGNMENT OF THE STOCK INVOLVED IN THIS ACTION, SUBJECT TO THE PLEDGE OF THE RESPONDENT.

As pointed out in the briefs, and in the oral argument, the bill of complaint made Freeman, as administrator, a party to this action, and alleged the validity of his assignment of the capital stock in question subject to the pledge to the respondent; also "that an accounting is necessary to ascertain what moneys, if any, were, at the time of said sale, and now are due or owing to said George R. Freeman upon the security of said transfer and assignment." Further "that it is necessary that the equities of all parties hereto be adjusted in one action; and that complainant is entitled to recover from defendant Peter Barceloux Company, the excess, if any, over and above the amount, if any, found to be due and owing to said George R. Freeman upon the security of said transfer and assignment at the time of said sale and still remaining due and owing, and the value of all of said shares of stock at the time of said sale."

Transcript of Record, pages 11 and 12.

The prayer of the bill is that the complainant have "judgment against defendant, Peter Barceloux Company, for the value of all of said shares of stock at the time of said sale, to-wit, August 16th, 1926, *less such sum, if any, as may be found to be due or owing*

to George R. Freeman, as administrator of the estate of Frank Freeman, deceased."

Throughout this appeal the respondent has attacked the judgment in this action on the ground that it awards the trustee in bankruptcy the full value of the stock, and not the value thereof, less the amount due Freeman as specifically alleged in the bill and in the prayer thereof.

At no time, either in the briefs, or in the oral arguments, has any attempt been made by the petitioner to answer this point.

Consequently, if this judgment is affirmed, and the full amount thereof is paid to the trustee, the latter is in the position of having recovered more than Fifty Thousand Dollars ($50,000.00) which, in his bill, he concedes to be the property of Freeman.

The answer to this proposition is found in the following quotation from the opinion rendered herein:

> "The argument for the defendant is that the Freeman administrator is estopped by force of his acceptance of a junior lien upon the shares, and that the trustee as his champion enjoys no better right. To overcome the supposed estoppel it is enough to recall the fact that at the time of the unlawful pledge the Freeman administrator was not the only creditor. The uncontradicted evidence is that there were many other creditors whose claims are still unpaid. What the trustee recovers will be for the benefit of all. Moore v. Bay, 284 U. S. 4.
>
> The result would not be different, however, if the administrator stood alone. Neither in his

own name nor indirectly through the trustee is he building any rights upon the pledge or claiming any preference over others. He has rejected the security and claims as a general creditor. There may have been obscurity as to this at the beginning of the suit. The bill of complaint which was a declaration by the trustee, and not by the administrator, gives recognition to the junior pledge as valid and subsisting. There has been no obscurity, however, since the trial and the interlocutory judgment. The pledge to the administrator is disregarded, and he is left in the same position with reference to any general creditors as if the transaction putting him ahead of them had been undone from the beginning. One who takes a mortgage or an assignment of an interest in property subject to a specific lien may be estopped while he retains the benefit from disavowing the attendant burden. Freeman v. Auld, 44 N. Y. 50, 53; Matter of Oakes, 248 N. Y. 280, 284. He either takes the security upon the terms conditioning the offer, or does not take it at all. The basis for an estoppel is cut away if the transaction is lawfully disaffirmed and the security abandoned. Old National Bank v. Heckman, 148 Ind. 490, 507. C. F. Bybee v. Oregon & Cal. R. R. Co., 139 U. S. 663, 682.

Disaffirmance and abandonment in this instance rested on sufficient grounds. The Freeman administrator, though informed of this fact that there was a pledge superior to his, had no knowledge of anything else. He was not informed of the circumstances essential to an understanding of the fraud. He did not even know, so far as

> the evidence discloses, whether the pledge was new or old. Only through later events was the collusive plan exhibited in all its sinister significance. There can be no irrevocable estoppel when the truth has been withheld."

We invite the attention of the Court to the fact that the defendant's position in this case is, not that Mr. Freeman was estopped by force of his acceptance of a junior lien upon the shares from questioning the pledge to the respondent, but that there was no fraud or attempt to hinder or delay him.

The position of the respondent is the same as that stated in the opinion of the Circuit Court of Appeals, that in this action the trustee has no cause of action other than, different from or in addition to a cause of action existing in favor of a creditor under the common law, and the statutes of California, to set aside any transaction made fraudulently and with the intent to hinder, delay and defraud the collection of his demand.

That it is an admitted fact in the case that at the time of this pledge, none of Mr. Barceloux's creditors were pressing him for payment, not even Freeman as administrator. The latter was only asking security.

It must be admitted that at no stage of this proceeding, as pointed out in the opinion of the Circuit Court of Appeals, has it been suggested that the pledge to the respondent was made with the intent to hinder, delay or defraud any creditor, except Freeman.

Consequently, our argument has been, and the decision of the Circuit Court of Appeals is, that in view of the situation of Freeman resulting from his having accepted an assignment of this pledge and with full knowledge of the facts, as well as his subsequent conduct of not questioning the pledge after he had knowledge of the sale thereof in September, 1926, and also in view of the further fact that no question was ever raised in regard to this pledge until this action was filed on April 3, 1928, there could be no fraud against Freeman.

As we understand the opinion of this Court, it is held that Mr. Freeman, as administrator, could not attack this pledge, because as the Court states in the above quotation "one who takes a mortgage or assignment of an interest in property subject to a specific lien may be estopped while he retains the benefit from disavowing the attendant burden. Freeman v. Auld, 44 N. Y. 50, 53; Matter of Oakes, 248 N. Y. 280, 284. He either takes the security upon the terms conditioning the offer, or does not take it at all."

We repeat and emphasize that this is an action for fraud based on the theory that the transaction was made with the intent to hinder, delay and defraud Freeman in the collection of his judgment, and as stated in the opinion of the Circuit Court of Appeals, there is nothing in this record to sustain the theory that the transaction was intended to hinder, delay or defraud any other creditor. Furthermore, at the time of this transaction, the bankrupt was taking care of his obligations and other creditors.

In the above paragraph this Court holds that the basis for an estoppel on the part of Freeman "is cut away if the transaction is lawfully disaffirmed and the security abandoned."

We respectfully submit that this question of disaffirmance and the abandonment of security by Freeman is not before this Court, and that neither Freeman nor the trustee at any time has taken the position that Freeman has either abandoned or disaffirmed this transaction. The only things appearing in the record on this subject are the allegations of the bill above mentioned. By these allegations, the trustee affirmatively asserted the validity of the Freeman assignment, and there is no pleading in this record that supports any theory that the trustee has abandoned the position taken by him in his verified bill.

Although joined as a defendant, Freeman as administrator, was never served and did not appear in the action. When the case was called for trial, petitioner availing himself of his right under the California statute, formally dismissed Freeman as a party. With this dismissal, George Freeman, as administrator of the estate of Frank Freeman, deceased, as a party, disappeared from this action.

It is true that George R. Freeman appeared as attorney of record for the trustee, petitioner herein, but it will not be contended that any conduct of George R. Freeman as attorney for petitioner could afford a basis for a finding that George R. Freeman as administrator of the estate of Frank Freeman,

deceased, had abandoned his rights under his assignment.

As a result, the respondent is left in this position. George R. Freeman, as administrator, is not bound by the decision of this Court that he has disaffirmed or waived his security.

The rights of the respondent by this opinion are fixed on the theory and the basis of the order affirming the decree, is that Freeman has waived his security. Therefore, the petitioner is permitted to recover money whch he alleges to be the property of Freeman, and the judgment is upheld as against this respondent on the theory that Freeman has waived his security, when such judgment in this action will not in any way prevent Freeman from asserting his security in the proper forum.

We therefore submit, that the recovery in this action must be predicated upon the assumption of the validity of the Freeman assignment, and that the petitioner's relief must be confined to the rights stated in the bill and the relief specifically prayed for.

The Court will note that throughout this proceeding, the petitioner, although frequently challenged with this proposition, has carefully refrained from making any statement or any commitment in any brief filed, or argument made, as to the validity of the Freeman assignment. This theory of the matter finds its first appearance in the opinion filed.

It would seem therefore to be conclusive that at most, the petitioner's recovery in this action must be

limited to the value in excess of the Freeman judgment.

Suppose Freeman should file an action against the Peter Barceloux Company for the value of this stock, or suppose there should be a controversy between Freeman and the trustee in bankruptcy as to the right of Freeman to so much of the recovery as may be necessary to discharge his demand, could it be contended that Freeman is bound by the decision of this Court in an action to which he is not a party?

So, we again call the attention of the Court to this phase of the decision and urge that a rehearing be granted, to the end that the judgment be affirmed on the ground that the case being predicated on the theory that it was to hinder, delay or defraud Freeman, that he cannot question the recovery; or if the trustee is entitled to recover, his recovery must be limited to the cause of action stated in the bill, to-wit: the value of the stock less the Freeman demand.

We also respectfully suggest, that to permit this opinion to stand in its present form, would be to adjudicate the rights of this respondent on the basis that Freeman, as administrator, had abandoned his security, when such adjudication will not bind Freeman, as administrator, from claiming the full amount of his security.

Will it be argued that when these funds are paid into the hands of the trustee, that this opinion will preclude Freeman as administrator from claiming the amount due on his judgment?

There is nothing in the record to show that Freeman as administrator is not building any rights upon his pledge or claiming any preference thereby, or that there has been any suggestion that Freeman as administrator has at any time disaffirmed the pledge or abandoned his security.

It is suggested that Freeman as administrator, though informed of the fact that there was a pledge superior to his, had no knowledge of anything else.

H. J. Barceloux testified that commencing with the affirmance of the judgment, and until some time in 1926, Mr. Freeman had direct knowledge of all of his properties, and assets, and that he kept nothing from him; that he knew everything. (R. 372.) Also that on numerous occasions while they were negotiating for the assignment of his interest in the Peter Barceloux Company stock he told Mr. Freeman that he owed the Peter Barceloux Company a considerable sum of money. (R. 374.)

These statements were not denied by Mr. Freeman. On the other hand, they are corroborated by the testimony of Mr. Freeman that his reason for not placing the amount of the indebtedness in the receipt, which he was asking the Peter Barceloux Company to sign, was probably because of his communication with Mr. Ware about the whole matter, and that there was something else to be considered. He testified: "I think probably there were other obligations which he owed the Peter Barceloux Company which were to go in the notice of assignment and I understood that." (R. 412.)

Also at page 401 of the Record, Mr. Freeman further testified:

> "In June, 1926, I did not have any notice that the Peter Barceloux Company held the stock of Henry J. Barceloux as security for any indebtedness *other than his statement to me that they had his stock as collateral for a loan or for a note of about $24,000.00 because he had previously given me a statement showing his indebtedness in $24,000.00 about.*" (Italics ours.)

On page 372 of the Record, H. J. Barceloux testified as follows:

> "Mr. Freeman, during the period commencing with the affirmance of the judgment until some time in 1926, had direct knowledge of my properties and assets. I told him what I had; kept nothing from him. I gave him statements and explained all about everything. He knew everything. I cannot state when I gave the statements to Mr. Freeman, but I think I gave him two."

It must be remembered that the bankrupt kept a full and complete set of books to which Mr. Freeman had access.

Is it to be assumed that Freeman, in view of the large amount of money due him, and the fact that he was seeking security therefor, did not make a complete and thorough investigation of the Peter Barceloux Company loan, as well as all other loans of the bankrupt? To credit him with anything less than this would be a reflection on his intelligence. Mr. Freeman testified that from the investigation he made, he concluded that Barceloux was solvent. It

does not appear that facts concerning his actual financial condition at the time of these transactions was unknown to Mr. Freeman and thereafter disclosed to him. Nothing appeared after the completion of these transactions which would show any collusion whatever in taking the written pledge to secure the indebtedness of the respondent.

Where is there any evidence of any fact that had been withheld from Mr. Freeman, or anyone else, concerning the property of the bankrupt or his affairs or his relations with respondent?

The pledgee's sale was conducted according to the strict requirements of the law of California, and in the same manner as thousands of sales under pledge or foreclosure are made. Notices were posted in three public places as required by law: One at the front door to the Court House; one at the Post Office, and the other on a telegraph pole at the sidewalk near Mr. Freeman's office. The sale was made on the steps of the Court House.

This Court in the case of *Hiscock v. Varick Bank,* 206 U. S., page 28, held that a sale of collateral security at public auction, without notice, and the purchase thereof by the pledgee, are not void as against the trustee in bankruptcy of the pledgor, in the absence of fraud where the contract of pledge permits such action, and is valid under the law of the state where such contract was made and executed and was to be performed. Also that the burden of proving that the sale by the pledgee of the property of bankrupt made conformably to the contract of

pledge was unfair is on the trustee in bankruptcy of the pledgor who seeks to avoid the sale.

The Court in that opinion points out that "the trustee did not offer to prove that others were prepared to purchase, and might have done so, but for want of information, or that the policies had a greater value than was realized at the sale, or that he was prepared to redeem the pledge for the benefit of the estate, nor did he offer to do so. There was nothing in the evidence tending to show a wanton sacrifice or an intention to buy in at so inadequate a price as to justify the inference of a fraudulent purpose."

We therefore respectfully submit, that a sale made in accordance with the contract of the parties, after notices posted as required by law in three public places, and in the most public place in the community, to-wit: the front door of a Court House, is not a legal gesture, but a strict compliance with the law, as well as the rule declared by this Court in *Hiscock v. Varick Bank,* supra.

Under the law, Freeman was not entitled to any notice. The law does not require the employment of an auctioneer. To offer the stock at public outcry and to wait for nearly an hour for a purchaser could hardly be said to indicate any sale to the disadvantage of anyone concerned. Also, it must be borne in mind that the pledge agreement in question waived notice and demand, and of course, there was no obligation on the part of the pledgee to make any demand or give any notice.

Consequently, the failure to make a demand or give notice cannot be made the basis for invalidating a contract which required neither.

Under the rule of *Hiscock v. Varick Bank*, supra, so far as the pledge in question is concerned, the respondent would have been within its rights had it been sold without demand or without notice.

II.

AS A MATTER OF LAW, AS WELL AS A MATTER OF FACT, THE EVIDENCE DOES NOT SUSTAIN A JUDGMENT AGAINST THE RESPONDENT.

The decision of the Circuit Court of Appeals is entitled to as much weight as the finding of the trial Court. Furthermore, under the rule of this Court, if there is any evidence sustaining the finding of the Circuit Court of Appeals, it will not be disturbed.

Varner v. New Hampshire Savings Bank, 24 U. S. 617; 60 L. Ed. 829.

Unquestionably the petitioner had the burden of proving by a preponderance of evidence that the transfer in question was made with the fraudulent intent of hindering, delaying and defrauding a creditor or creditors of the bankrupt. At the trial, the plaintiff offered no evidence in support of this charge, except the evidence of George and Henry Barceloux and Mrs. Gelinas and George R. Freeman.

Certificate No. 5, bearing the written endorsement of the pledge, was admittedly in the possession of the respondent. Likewise, the written contract of pledge

of shares of the Peter Barceloux Company was offered and admitted in evidence.

There is nothing in the testimony of Freeman, or any other witness, in any way impeaching the genuineness of these documents, or that the respondent was at all times in the possession thereof.

Consequently, if we adopt the rule that the testimony of George and Henry Barceloux and Mrs. Gelinas is to be wholly rejected and disregarded, then nothing is left in the record but the writings.

As a legal proposition, the presumption is of innocence and against fraud, the presumption of valid consideration, and the presumption of delivery arising from these facts must control and determine the action in favor of the respondent.

This situation of the record compelled the following admission, found on page 67 of petitioner's brief:

> "There is no conflict in the evidenec or the sequence of the various transactions between the bankrupt and the respondent company, but the only conflict, if any, is in the inferences that may be deduced from these facts."

It cannot be asserted in the face of the record and this admission of counsel that there was any direct evidence of fraud, but on the contrary, the whole case of the petitioner rests on inferences.

The essential element of fraud is intent. Unless the inference of fraudulent intent only can be proven from the evidence, then the finding must be in favor of the respondent.

Again, George and Henry Barceloux and Mrs. Gelinas stand unimpeached, and their testimony is consistent with every transaction made. It must be borne in mind that both the Peter Barceloux Company and H. J. Barceloux at all times kept a full and complete set of books and records and that the contemporaneous entries are all consistent with the testimony of these witnesses.

In the case of *Pennsylvania Railway Co. v. Chamberlain*, 77 Advance Sheets, No. 9, page 507, decided by this Court after the filing of the briefs in this action, the Court laid down this rule:

> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover."
>
> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist."

This decision is squarely in point because this case must rest upon an inference either in favor of fraud or against fraud.

For the reasons stated in this opinion the petitioner cannot recover, because he has not sustained the burden of proof. Furthermore, under the rule that where two inferences are to be drawn from the same set of facts, one in favor of fair dealing and the other in support of corrupt practice, it is the express duty of the Court or jury to draw the inference in favor of fair dealing.

We, therefore, submit that as a matter of law, the plaintiff failed to sustain the burden of proof, and the evidence is insufficient to sustain a finding of fraud.

As to the other proposition stated in the quotation from the opinion of the Court, it is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, to draw an inference contrary to their evidence.

To emphasize our position that the evidence does not sustain a finding of fraud, and in justice to the respondent, as well as to this Court, we will take the liberty of directing attention to some of the statements contained in the opinion.

The opinion states that the book value of the property was over $90,000.00 and the actual value over $94,000.00. This statement should be weighed in view of the undisputed testimony that this book value does not represent any actual estimate of the value of the stock, but was a mere bookkeeping entry made at the time that the corporation was organized. George A. Barceloux testified on this subject on pages 193 and 194 of the record. His statement is:

> "Those valuations are an arbitrary valuation and there was no appraisement of the assets and the values placed on them were made for the purpose of opening our books and just to make the book entry, and according to our books the amount of our undivided profit is $35,861.24 on December 31, 1928, at the close of business last year."

That $90,000.00 could not be the fair value of the stock is manifest from the figures printed on pages 115 et seq. of appellant's opening brief in the Circuit Court of Appeals.

We will not burden the Court at this time with any detailed review of the figures, but will direct attention of the Court to the fact that the real property, the principal asset of this corporation, was not paying any profit whatever, and in some instances not yielding a sum sufficient to pay the taxes and the special assessments. Furthermore, that the corporation had been operating at a constantly increasing loss from 1926 to 1928, the date of the trial. Also that it was a family corporation; that its assets were subject to a reservation in favor of Lumina Barceloux for all of the net income thereof.

The opinion states "The business was a family affair, and strangers were not welcome within the family preserve."

At no time during these entire transactions did any occasion arise whereby any stranger was attempting to enter "the family preserve," with the possible exception of the acceptance of the assignment of the capital stock by Mr. Freeman. There is nothing in

this record that shows that this corporation at any time attempted to prevent Mr. Freeman from securing his debt, or from having any information concerning its affairs.

The opinion proceeds to state that "A time arrived when the unwelcome stranger seemed likely to break in. The family combined to maintain its solidarity and keep the intruder out."

First, it must be borne in mind that H. J. Barceloux borrowed $3000.00 from this corporation and paid it on the Freeman judgment with his knowledge. Barceloux drew a check on the funds of the corporation for $3000.00 and paid it on account of the Freeman judgment. (R. 303 and 304.) Was this an attempt to "keep the intruder" out?

The opinion states that "Freeman had been lenient."

The judgment was entered in favor of Freeman on July 25, 1921. Enforcement of the judgment was stayed on appeal.

Freeman v. Donohoe, 188 Cal. 170.

The judgment was affirmed and the remittitur filed on February 26, 1924. The pledges in question were made in June, 1926, or more than two years after the judgment was affirmed. So far as the respondent is concerned, there is no evidence of any action prior to the dates of the pledges in June, 1926.

On the other side of the picture, it is admitted that during this entire period of time and until the month of November, 1926, when Freeman attached without warning, Freeman and Barceloux and the latter's

attorney were cooperating to collect the judgment from Donohoe.

In view of this admitted friendly and cooperative effort on the part of Freeman and the judgment debtor, there was no reason for any activity on the part of anyone. This friendly relation existed at the time of the pledges and for months afterward. It is manifest that the bankrupt was only arranging his affairs to the satisfaction of his two principal creditors.

The second pledge was made after Freeman had accepted his security following a complete investigation of all of the bankrupt's affairs. The other creditors of Barceloux were few in number, and as stated in the opinion, were not importunate.

The Court states that "With these intruders visible, the family set out to build protective barriers."

All that this family did was to accept this pledge as security for an admitted indebtedness. If this family was intending to build a protective barrier, the shares in question would have been transferred unconditionally in satisfaction of the debt, instead of by pledge, so that Mr. Freeman could not take the assignment subject to the pledge, or levy execution thereon. Furthermore, the corporation did not take any steps to sell the property until August, 1926, notwithstanding the fact that it had the legal right under the rule laid down in *Hiscock v. Varick Bank*, supra, as far as these pledges are concerned, to sell without notice or demand.

The statement in the opinion that Mr. Freeman "was put off in June, 1926, with an assignment of the equity in the Barceloux shares, together with an assignment of an interest in heavily mortgaged lands," must be viewed in the light of the undisputed testimony that at no time did the respondent in this action ever request any delay, or any other act on the part of Freeman in connection with any of these transactions.

On the other hand, it must also be borne in mind that the bankrupt kept his agreement with Freeman to cooperate with him in the collection of the Freeman judgment against Donohoe, and that Freeman expressly admits that the bankrupt kept his agreement. (R. 401.)

The undisputed testimony of Mr. Barceloux is that he and his attorney stated to Mr. Freeman that it was his full intention to pay the judgment, but wanted his assistance in running down Donohoe to make him pay his half.

We respectfully submit that Mr. Freeman was not put off, but was assisted in the collection of his judgment. This is further evidenced by the payments made on the judgment.

The corporation was acting within its legal rights in refusing to agree to give Mr. Freeman ninety days notice before enforcing its security. The only inference that can be drawn from this, is that, if Mr. Freeman had the slightest idea of any fraud or fraudulent conduct, or any attempt to "put him off," he would have immediately instituted proceedings against this corporation or levied his execution on the capital

stock, or filed an action to attack the pledges on the ground of fraud.

The statement that the "defensive barrier was extended" after the request for notice was refused is not in harmony with the dates of the several transactions.

Both pledges had been fully completed as alleged in the bill and the property delivered to the respondent before any request was ever made for notice or demand, or for the ninety day agreement.

While it is true that the bankrupt owned a few shares of stock of other corporations not pledged as collateral, still Mr. Freeman with full knowledge of all the facts made his own selection, and if he accepted the stock of the respondent as collateral security, it was his choice made after full investigation, and not at the suggestion of either Barceloux or the respondent.

The cancellation of the certificate and the issuance of the new one was simply in accordance with law and the usual practice of transferring shares of stock when pledged as collateral security for a loan.

Again it is stated in the opinion "He had equities in other properties, lands and shares of stock. He sold part to his sister and part to his wife. The value in each instance was in excess of the price."

For the sake of the record, we wish to call the attention of the Court to the evidence on these two points. The only testimony as to the transaction between the bankrupt and his wife is that of the bankrupt. (R. 355 and 370.) His testimony is that he was selling a

contingent interest to his wife to borrow $1000.00 from her separate funds to pay a power bill and other expenses connected with his business affairs. He testified that she lost $80.00 on the deal. (R. 370.) This is the only testimony on the subject. If it is to be rejected, then the record is silent.

We, therefore, submit that this cannot be accepted as any badge of fraud.

We next direct the attention of the Court to the transaction between the bankrupt and his sister, Mrs. Gelinas, after Freeman had taken his security. This is a similar situation. It involves no relation of debtor and creditor. It was an outright sale and purchase. The only evidence on the subject except that of Mrs. Gelinas and Henry Barceloux is the testimony of Mr. Freeman as to his investigations of the value of this stock, the amount of the loan and his refusal to accept the same as security for his debt.

On pages 402 and 411 of the record, the Court will find that Mr. Freeman testified that he went to the various banks and found out the amounts that were against them. That he personally called upon the Peoples Bank and the United Bank and Trust Company to ascertain the condition of the loans. He refused to accept this security which had been tendered to him by Mr. Barceloux.

After the completion of the pledges by Barceloux to the respondent and appellant, according to the testimony of Mrs. Gelinas and Barceloux, the latter approached her with the proposition of taking over the stock pledged to these two banks subject to the debts against it, which had been previously refused

by Mr. Freeman. It was finally agreed that Barceloux would sell the stock to Mrs. Gelinas, she to assume the amount of the obligation against it and to pay him $2000.00 in cash. This stock consisted of 158 shares of the Glenn County Bank valued by the Master at $70.00. This valuation by the Master was rejected by the trial Court on the motion of the plaintiff and the valuation increased to $125.00 per share. (R. 103.)

Judge Sawtelle, in his dissenting opinion, reversed this finding and restored the value to $70.00 a share. Aside from this, the valuations placed on the stock by the parties is controlling. The valuation of the assets taken over by Mrs. Gelinas would then be as follows:

158 shares of Glenn County Bank, $11,600.00.

26 shares United Bank and Trust Company, $2600.00.

35 shares Union Trust rights, $350.00.

Total value, $14,550.00.

The amount of the indebtedness was $13,800.00, and Mrs. Gelinas paid $2000.00 additional in cash, a total of $15,800.00. This is $1250.00 in excess of the value.

If this is not sufficient to demonstrate that she did not pay less than the value of the shares, we call attention to the testimony on page 393 of the record. To take up these loans, Mrs. Gelinas executed two notes, one for $6000.00 to the Peoples Bank and one for $7800.00 to the United Bank and Trust Company, and she gave 26 shares of City Service and 41 shares of Tidewater Associated Oil Company as additional security for the loan.

We respectfully request that this statement should be expunged from the opinion of the Court, because a case is pending in the United States Circuit Court of Appeals by the trustee in bankruptcy, petitioner in this action, against Mrs. Gelinas involving this transaction. An attempt will be made to use this statement in that litigation to the disadvantage of Mrs. Gelinas.

The whole record in the Gelinas case is not before this Court. If we accept the testimony of Mrs. Gelinas, the statement is not supported by the record, and if we reject her testimony, there is no evidence on the subject.

The transfer of the office fixtures by the bankrupt to his attorney was after Mr. Freeman had levied the execution on all of the property of the bankrupt which he desired to subject to his demand.

We also suggest to the Court the point made in the brief that the Peter Barceloux Company is not bound by any transfer made subsequent to the pledge, and mentioned in the opinion of the Court, for the reason that it was not a party to any of such transactions. As a matter of law it cannot be so bound.

The bill in this action does not allege any general plan or scheme or conspiracy to defraud anyone. It simply attacks two transfers. These transfers were separate and independent transactions between the respondent and Barceloux and had no connection whatever with any of the other transfers mentioned in the opinion or shown by the evidence.

There is nothing in this evidence to show that the members of the Peter Barceloux family are other than people of the highest standing and responsibility in the communities in which they reside, and they should not be subjected to the odium and disgrace of a finding that they were guilty of fraudulent practice as charged in the bill and stated in the opinion, in the absence of strong and conclusive evidence of their guilt, particularly in view of a contrary finding by the Circuit Court of Appeals.

In any event, this judgment should be modified to reduce this recovery to the right claimed by the plaintiff in the bill, to-wit: The value of the stock less the amount due Freeman on his judgment.

We, therefore, earnestly request this Court to reconsider the case in the light of the foregoing suggestions and that the opinion of the Circuit Court of Appeals be affirmed.

Dated, Woodland, California,
April 24, 1933.

Respectfully submitted,
ARTHUR C. HUSTON,
STEPHEN W. DOWNEY,
Solicitors for Respondent and Petitioner.

HUSTON, HUSTON & HUSTON,
W. T. BELIEU,
PERCY NAPTON,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for respondent and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, Woodland, California,
April 24, 1933.

ARTHUR C. HUSTON,
Of Counsel for Respondent and Petitioner.

Due service and receipt of a copy of the within is hereby admitted

this 27 *day of April, 1933.*

Robt. T. Devlin

Wm H Devlin

Horace B Wulff

George R. Freeman

Solicitors for Petitioner

George F. Longsdorf
Arthur C. Devlin
J. I. Diepenbrock
Of Counsel

SUPREME COURT OF THE UNITED STATES.

No. 564.—October Term, 1932.

E. F. Buffum, as Trustee in Bankruptcy of Henry Joseph Barceloux, Petitioner,
vs.
Peter Barceloux Company.

On Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

[April 10, 1933.]

Mr. Justice Cardozo delivered the opinion of the Court.

In April, 1926, the bankrupt, Henry Barceloux, was the owner of 2500 shares of the Peter Barceloux Company, a quarter of the capital stock. The other three quarters were owned, one by his brother George, one by his sister Cora, and one by three nephews, the sons of a deceased brother. The book value of the bankrupt's shares was over $90,000, and the actual value over $94,000, but the shares were not traded in, and had no current value in the market. The business was a family affair, and strangers were not welcome within the family preserve.

A time arrived when the unwelcome stranger seemed likely to break in. The family combined to maintain its solidarity and keep the intruder out. Henry Barceloux had become heavily involved in debt. A former partner, Freeman, had recovered a judgment against him for nearly $50,000. Freeman had been lenient, but Freeman was now dead, and the administrator was asking for security as the price of delay. There were other creditors too, though they are not shown to have been importunate. With these intruders visible, the family set out to build protective barriers. There is testimony that Henry Barceloux was indebted to the corporation in upwards of $33,000. On April 27, 1926, he secured part of this indebtedness by a pledge of 2499 shares of the Barceloux stock. The agreement was in writing. We are assured by the family that it was confirmatory of an oral agreement made some years before, but the testimony as to this is not persuasive, and might, not unreasonably, be rejected by the trier of the facts.

The movement of events was swift thereafter. The Freeman administrator had still to be placated. He was put off in June, 1926, with an assignment of the equity in the Barceloux shares together with an assignment of an interest in heavily mortgaged lands. He gave notice to the corporation of his interest in the shares and made demand upon the secretary for a statement of the indebtedness secured by the superior lien. He also asked for an agreement that the corporation give him notice of ninety days before enforcing its security. His activity aroused the family to new measures of protection. The request for notice was refused, and the defensive barrier extended. Henry Barceloux was then the owner of shares of stock in other corporations, his ownership till then being clear of any lien. On June 29, 1926, he pledged his interest in these shares (worth about $2158) as additional security for the family debt. In so doing he stripped himself of the control of all or nearly all his unincumbered assets. On the same day, or perhaps a few days later, the corporation canceled the certificate for 2499 shares which was in the name of the pledgor, and took out a new certificate in its own name as pledgee.

The scene was now ready. The time for action was at hand. On August 16, 1926, there was the gesture of a public sale. A printed notice had been posted on a telegraph pole and perhaps elsewhere. There was no other notice either to Freeman or to any one else. At the appointed time, the members of the family, accompanied by a lawyer, went through the form of an auction on the steps of the court house. The debtor's sister Cora, who was a director of the corporation, read the notice of sale and asked for bids; all the collateral, both the Barceloux shares and the others, being offered as a single lot. The brother George, who was then the president, made a bid for the entire lot in the name of the Barceloux corporation, the bid being for the amount of its claim against the debtor and a fee for its attorney. No sooner had the corporation bought than it sold back again to George. In payment for what it sold, it took his promissory note with a pledge of the shares as collateral security. About two years later, it canceled the resale, gave back the promissory note and thereafter held the shares as owner. In the meanwhile a few scraps of property retained by Henry Barceloux had been put out of his name. He still held one share in the Barceloux Company. He sold it to his sister. He had equities in other properties, lands and shares of

stock. He sold part to his sister and part to his wife. The value in each instance was in excess of the price. The equity in collateral pledged with a bank in San Francisco went to the Barceloux Company, which assumed the payment of the debt. All that was then left to him was his office furniture and fixtures, and this he transferred to his attorney. By October, 1926, he had stripped himself of everything. He waited four months, and became a voluntary bankrupt.

The trustee in bankruptcy has brought this suit under § 70 (e) of the National Bankruptcy Act* to recover from the Barceloux Company the value of property pledged by the bankrupt with fraudulent intent. At the filing of the bill the company had resold the shares to George Barceloux, its president; and the prayer for relief, adapting itself to the situation then existing, was for the value of the shares on August 16, 1926, with interest at 7%, the statutory rate of interest in the state of California. There was also a prayer for an accounting and for any other relief consistent with equity. The District Court found that the fraudulent intent had been made out; that both pledgor and pledgee were sharers in it; and that there should be an appointment of a master to take and state an account and to report the value of the property covered by the pledge. Upon the coming in of the report, there was a final judgment for $106,409.44, with costs, in favor of the trustee. 51 F. (2d) 80.

An appeal by the defendant followed with the result that the decree was reversed, one judge dissenting. 61 F. (2d) 145. The Court of Appeals held that the Freeman administrator was estopped from contesting the validity of the pledge by reason of the fact that he had accepted a pledge of the equity in the shares, subject by its terms to the pledge already made. Finding no sufficient evidence that other creditors were aggrieved, it refused to pass upon the question whether the pledge as to them was good or bad. It held, however, that the sale under the pledge had not been fairly made, and that a resale should be ordered. Upon the argu-

*"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication." National Bankruptcy Act, § 70 (e), July 1, 1898, c. 541, 30 Stat. 565; 11 U. S. Code, § 110.

ment the defendant had made profert of the Barceloux certificate, and had left it with the court to be disposed of in any way consistent with equity and conscience. The shares in other corporations it could not produce, having disposed of them again. The court held that there could be no recovery of the value of the Barceloux shares in view of the willingness of the defendant to submit to a resale. Judgment was therefore ordered that the shares be resold under the direction of the court of bankruptcy; that out of the proceeds the Barceloux Company be paid its indebtedness with interest (less the value of the shares that it was unable to surrender); and that only the surplus, if any, be paid to the trustee. A writ of certiorari brings the case here.

1. The evidence sustains the finding of the District Court that the pledge to the defendant was made in fraud of creditors.

More is here than a mere preference. If that and nothing else had been intended, the pledge would be proof against attack, for it was made more than four months before the bankruptcy petition. But in truth there was much besides. The pledge was a step in a general plan which must be viewed as a whole with all its composite implications. *Dean* v. *Davis*, 242 U. S. 438, 444; *Coder* v. *Arts*, 213 U. S. 223, 244. The principal assets of the debtor were his certificates of stock in the family corporation. There was to be a delivery of these certificates as security for an indebtedness much less than the value of the collateral deposited. There was to be a delivery of other security to make sure that all the assets of the debtor, not otherwise incumbered, would be within the control of the pledgee. There was to be a sale so secret that none of the creditors would be likely to know anything about it, with the result that other bids would be forestalled, and embarrassing inquiries as to preferences averted. Finally, to make the job a thorough one, the odds and ends of other assets were to be conveyed to friends or relatives. As the outcome of these manoeuvres the Barceloux Company canceled an indebtedness of about $33,000, and became the owner of stock certificates worth triple that amount. The unconscionable sale is not to be viewed in isolation, as something disconnected from the pledge, an accident or after-thought. It was the fruit for which the seed was planted, or so the trier of the facts might look at it. The Barceloux Company set out to do something more than secure the pay-

ment of a debt. It became a party to a plan to appropriate a surplus and in combination with its debtor to hold his creditors at bay. *Dean* v. *Davis, supra; Shapiro* v. *Wilgus,* 287 U. S. 348. So the District Judge interpreted the transaction, viewing the events consecutively as stages of an unfolding plot. We discover no sufficient reason for rejecting his conclusion. Indeed the Circuit Court of Appeals held nothing to the contrary. It refrained from approving or condemning the purpose of the pledge, being led to that course by the application of the doctrine of estoppel. The finding therefore stands.

2. The trustee is not subject to the bar of an estoppel in his effort to undo the fraud.

The argument for the defendant is that the Freeman administrator is estopped by force of his acceptance of a junior lien upon the shares, and that the trustee as his champion enjoys no better right. To overcome the supposed estoppel it is enough to recall the fact that at the time of the unlawful pledge the Freeman administrator was not the only creditor. The uncontradicted evidence is that there were many other creditors whose claims are still unpaid. What the trustee recovers will be for the benefit of all. *Moore* v. *Bay,* 284 U. S. 4.

The result would not be different, however, if the administrator stood alone. Neither in his own name nor indirectly through the trustee is he building any rights upon the pledge or claiming any preference over others. He has rejected the security, and claims as a general creditor. There may have been obscurity as to this at the beginning of the suit. The bill of complaint which was a declaration by the trustee, and not by the administrator, gives recognition to the junior pledge as valid and subsisting. There has been no obscurity, however, since the trial and the interlocutory judgment. The pledge to the administrator is disregarded, and he is left in the same position with reference to any general creditors as if the transaction putting him ahead of them had been undone from the beginning. One who takes a mortgage or an assignment of an interest in property subject to a specific lien may be estopped while he retains the benefit from disavowing the attendant burden. *Freeman* v. *Auld,* 44 N. Y. 50, 53; *Matter of Oakes,* 248 N. Y. 280, 284. He either takes the security upon the terms conditioning the offer, or does not take it at all. The basis for an estoppel is cut away if the transaction is lawfully disaffirmed

and the security abandoned. *Old National Bank* v. *Heckman*, 148 Ind. 490, 507. Cf. *Bybee* v. *Oregon & Cal. R. R. Co.*, 139 U. S. 663, 682.

Disaffirmance and abandonment in this instance rested on sufficient grounds. The Freeman administrator, though informed of the fact that there was a pledge superior to his, had no knowledge of anything else. He was not informed of the circumstances essential to an understanding of the fraud. He did not even know, so far as the evidence discloses, whether the pledge was new or old. Only through later events was the collusive plan exhibited in all its sinister significance. There can be no irrevocable estoppel when the truth has been withheld.

3. The repurchase of the certificates by the fraudulent grantee during the pendency of the suit did not make it error for a court of equity to render judgment for the value.

There is no occasion to consider what relief would have been proper if the certificates had been owned by the defendant at the filing of the bill, and had been continuously retained thereafter. We may assume, though we do not decide, that the trustee, suing in such circumstances for an accounting in equity, would have had the shares, and not the value. See *Dunphy* v. *Kleinsmith*, 11 Wall. 610; *Wacey* v. *Holbrook*, 141 App. Div. 336; 206 N. Y. 708; and compare American Law Institute, Restatement of Law of Trusts, Tentative Draft No. 3, § 199, and cases cited, pp. 157, 158. The fact is, however, that at the filing of the bill, the defendant had assigned the certificates to another, who was not a party to the suit. The assignment is alleged in the complaint and admitted in the answer. Not till May 11, 1928, after the answer had been filed, did George Barceloux return his certificates to the defendant and thus reinstate its title. This being so, the suit in its inception was properly framed as one for money relief, the value of the shares at the time of the foreclosure of the pledge. There was no objection at any stage of the controversy that the case was triable by a jury. *Schoenthal* v. *Irving Trust Co.*, 287 U. S. 92; *United States* v. *Bitter Root Co.*, 200 U. S. 451. In saying this we do not intimate that the objection would have prevailed, if seasonably urged. There were entanglements that may have called for discovery and accounting, at least in possible contingencies. The point will not be labored, for at the trial the defendant did not argue to the contrary (*Reynes* v. *Dumont*, 130 U. S. 354, 395;

American Mills Co. v. *American Surety Co.*, 260 U. S. 360, 363; *Schoenthal* v. *Irving Trust Co., supra,* at p. 96), and does not even now. By common consent the suit was tried as one in equity, the fraudulent grantee being held to account as a trustee *ex maleficio* for the value of the shares which it had fraudulently acquired and then conveyed to some one else. *United States* v. *Dunn*, 268 U. S. 121; *Independent Coal & Coke Co.* v. *United States*, 274 U. S. 640, 647; *Newton* v. *Porter*, 69 N. Y. 133; *Hamilton National Bank* v. *Halsted*, 134 N. Y. 520, 527. A like recovery would have been permitted if the suit had been at law.

The defendant being chargeable with the value upon the filing of the bill, the question for us now is whether it could change its liability by buying back the shares. The answer is supplied by the opinion of Story, J., in *Oliver* v. *Piatt*, 3 How. 333, 401, a landmark in the law of trusts. The trustee who misapplies the subject matter of a trust becomes accountable at once for the proceeds or the value. Cf. *Hamilton National Bank* v. *Halsted*, *supra*. Nothing that he can do afterwards in buying the property back will affect that liability, except at the option of the beneficiary complaining of the wrong. "This right or option of the *cestui que trust* is one which positively and exclusively belongs to him, and it is not in the power of the trustee to deprive him of it by any repurchase of the trust property, although in the latter case the *cestui que trust* may, if he pleases, avail himself of his own right, and take back and hold the property upon the original trust; but he is not compellable so to do." *Oliver* v. *Piatt*, *supra;* and cf. *Bunnel* v. *Stoddard*, 4 Fed. Cas. 667, 683; *Miles* v. *Coombs*, 120 Maine 453, 455; *Burwell* v. *Burwell's Guardian*, 78 Va. 574, 582; *Bate* v. *Scales*, 12 Ves. 402; American Law Institute, Restatement of Law of Trusts, *supra*. Any other rule, it was said, would enable the wrongdoer to take advantage of his own wrong; to let the transaction stand, if the investment showed a profit, and by aid of a repurchase to charge the beneficiary with an intermediate decline. Cf. *Barney* vs. *Saunders*, 16 How. 535, 543. The standard of duty is no different whether the trust to be enforced is actual or constructive. *United States* v. *Dunn*, *supra; Independent Coal & Coke Co.* v. *United States*, *supra; Newton* v. *Porter*, *supra*. The implication of a trust is the implication of every duty proper to a trust. Equity has its distinctive standards of fidelity and honor, higher at times than the standards of the market place.

Meinhard v. ***Salmon***, 249 N. Y. 458, 468. Whoever is a fiduciary or in conscience chargeable as a fiduciary is expected to live up to them.

4. The ruling of the trial court whereby the highest value of the property up to the time of the decree was made the measure of the recovery was not harmful to the defendant.

The recovery would have been larger if the value at the sale with legal interest thereafter had been adopted as the measure.

5. The defendant may participate on the same basis with other creditors in the distribution of the assets.

The decree of the District Court is erroneous in so far as the claim of the defendant is postponed to those of others. ***Moore*** v. ***Bay, supra.***

The decree of the Circuit Court of Appeals is reversed, and that of the District Court modified in accordance with this opinion and as modified affirmed.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.